Supreme Court, U.S.
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In The

# Supreme Court of the United States

HARVEY AND DORIS MADISON, CHARLES AND ELENA D'AUTREMONT, and HARRISON SAUNDERS,

*Petitioners,*

v.

PATRICK J. GRAHAM, Director, Montana Department of Fish, Wildlife, and Parks; STAN MEYER, DAVID SIMPSON, CHARLES DECKER, DARLYNE DASCHER, and TIM MULLIGAN, Commissioners, Montana Fish, Wildlife and Parks Commission; MONTANA COALITION FOR STREAM ACCESS; MONTANA WILDLIFE FEDERATION; MONTANA CHAPTER OF TROUT UNLIMITED; and FISHING OUTFITTERS ASSOCIATION OF MONTANA,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## ISSUE PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment provides substantive protection against arbitrary state interference with private property, or whether a property owner's sole remedy for arbitrary state interference with private property is to seek "just compensation" under the Takings Clause of the Fifth Amendment?

## LIST OF PARTIES

The following parties were Plaintiffs at the U.S. District Court and Appellants before the U.S. Court of Appeals for the Ninth Circuit: Harvey and Doris Madison, Charles and Elena d'Autremont, and Harrison Saunders (hereinafter collectively "Montana Landowners"). The following parties were Defendants at the U.S. District Court and Appellees before the U.S. Court of Appeals for the Ninth Circuit: Patrick J. Graham, Director, Montana Department of Fish, Wildlife and Parks; and Stan Meyer, David Simpson, Charles Decker, Darlyne Dascher, and Tim Mulligan, Commissioners, Montana Fish, Wildlife and Parks Commission. The following were Defendants-Intervenors at the U.S. District Court and Appellees-Intervenors before the U.S. Court of Appeals for the Ninth Circuit: Montana Coalition for Stream Access; Montana Wildlife Federation; Montana Chapter of Trout Unlimited; and Fishing Outfitters Association of Montana.

## STATEMENT OF RELATED CASES

Petitioners are unaware of any related cases that either are pending review or were reviewed previously by this Court.

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## OPINIONS BELOW

Review is sought of the opinion of the United States Court of Appeals for the Ninth Circuit, *Madison, et al. v. Graham, et al.*, 316 F.3d 867 (9th Cir. 2002), which was issued on December 23, 2002, and is reproduced at Appendix ("App.") 1-11. The opinion and order of the United States District Court for the District of Montana, *Madison, et al. v. Graham, et al.*, 126 F. Supp.2d 1320 (D. Mont. 2001), appear at App. 12-28.

## JURISDICTION

The Supreme Court has jurisdiction to review this opinion pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth and Fourteenth Amendments to the United States Constitution are involved in this Petition for *Writ* of *Certiorari*. U.S. Const., amends. V, XIV (App. 29).

## STATUTE INVOLVED

The statute involved in this Petition is the Montana Stream Access Law, Mont. Code Ann. §§ 23-2-301, *et seq.* (App. 30-38).

## STATEMENT OF THE CASE

On May 31, 2000, Montana Landowners filed their complaint in the United States District Court for the District of Montana challenging the Montana Stream Access Law, Mont. Code Ann. §§ 23-2-301, *et seq.*, as a violation of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

On August 3, 2000, Defendants filed a Rule 12(b)(6) motion to dismiss. On August 14, 2000, the Montana Wildlife Federation, Montana Chapter of Trout Unlimited, Montana Stream Access Coalition, and Fishing Outfitters Association of Montana (hereinafter collectively "Intervenors") moved to intervene and to file a motion to dismiss, which motion was granted on November 30, 2000, over Montana Landowners' objections.

On January 4, 2001, the District Court granted Defendants' and Intervenors' motions to dismiss, holding that *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (*en banc*), required the District Court to view Montana Landowners' Fourteenth Amendment substantive due process claim as a Fifth Amendment takings claim. App. 18. Thereafter, recognizing that Montana Landowners had not brought a takings claim, the District Court held that, had they done so, a takings claim would be invalid for failure to exhaust state remedies. App. 18. Furthermore, the District Court characterized the Stream Access Law's interference with Montana Landowners' property as being, on the one hand, "*de minimus*," and, on the other hand, interfering not at all. App. 19-20. The District Court further stated, in *dicta*, that the Stream Access Law substantially advances a legitimate government interest and is not irrational or arbitrary. App. 21. The District

Court then addressed, again in *dicta*, the arguments raised by Intervenors, concluding that Montana Landowners' complaint was barred by the statute of limitations, *res judicata*, the Full Faith and Credit Statute (28 U.S.C. § 1738), and the Rooker-Feldman Doctrine. App. 22-25.

On February 5, 2001, Montana Landowners timely filed their Notice of Appeal to the U.S. Court of Appeals for the Ninth Circuit. On December 23, 2002, the Ninth Circuit affirmed that portion of the decision of the District Court that relied on the Ninth Circuit's decision in *Armendariz. Madison, et al. v. Graham, et. al.*, 316 F.3d 867 (9th Cir. 2002); App. 1-11. The Ninth Circuit held that its *en banc* ruling in *Armendariz* required that claims alleging governmental interference with property must be brought under the Takings Clause of the Fifth Amendment, rather than the Due Process Clause of the Fourteenth Amendment, because the Takings Clause "provides an explicit textual source of constitutional protection" for private property. App. 9. Accordingly, the Ninth Circuit held that Montana Landowners' substantive due process claim was precluded because "appellants have alleged harms addressed exclusively by the Fifth Amendment's Takings Clause." App. 9. As a result, the Ninth Circuit declined to address any other aspect of the District Court's decision. App. 3.

## STATEMENT OF FACTS

Harvey and Doris Madison of Absarokee, Montana; Charles and Elena d'Autremont of Alder, Montana; and Harrison Saunders of Ennis, Montana; are longtime Montana residents. When these Montana Landowners acquired

their property, the law was clear: they owned and paid taxes on the property beneath the non-navigable streams on their land. Thus, under the U.S. Constitution, they had a right to determine who, if anyone, came upon their land. The expression, "Ask before hunting or fishing on private land," was not just a bumper sticker; it was the law. The Montana Stream Access Law changed that. Today, the non-navigable streams on their lands are public thoroughfares that have robbed these Montana Landowners of their privacy, subjected their land to commercial exploitation, and despoiled the pristine beauty of the land they love.

In 1905, Harvey Madison's grandfather, Mathew Madison, homesteaded a 1,000-acre ranch on the Stillwater River in Stillwater County, Montana. Since 1978, the Madisons, Harvey and Doris, have owned the ranch pursuant to inheritance of the Desert Lands homestead patent issued by the United States to Mathew Madison in 1905. Their property encloses approximately one mile of the Stillwater River, which is not, and historically has never been, commercially navigable. App. 4. The Stillwater River flows within approximately 300 yards of the Madison's home and within 50 feet of a barn on their property, near which the Madisons keep cattle and horses. The streambed and banks of the portion of the Stillwater River flowing through the Madisons' property are owned by the Madisons because that portion of the Stillwater River is non-navigable. App. 4. Not only do the Madisons own title to the streambed and banks of the Stillwater River on their property, they pay taxes on those lands.

Charles and Elena d'Autremont maintain a residence in Alder, Montana. Since 1978, the d'Autremonts have owned a 275-acre ranch on the Upper Ruby River in

Madison County, Montana. Their property encloses approximately one and one-half miles of the Ruby River, which is not, and historically has never been, commercially navigable. App. 4. The Ruby River flows within 150 feet of the front door of the d'Autremonts' dwelling on their property. The streambed and banks of the portion of the Ruby River flowing through the d'Autremonts' property are owned by the d'Autremonts because that portion of the Ruby River is non-navigable. App. 4. Not only do the d'Autremonts own title to the streambed and banks of the Ruby River on their property, they pay taxes on those lands. The d'Autremonts purchased their Montana property, after a number of years in the whitewater outfitting business in Wyoming and Utah, because they sought a remote and private place to raise their family. After purchasing their Montana property, the d'Autremonts ejected a steady stream of trespassers for several years and saw a corresponding improvement in the fishing on their property. All of their neighbors followed the same practice, under the belief that since they held title to and paid taxes on the land under the Ruby River, they were entitled to choose who stood on and thus impacted that land.

Since 1876, Harrison Saunders' family has owned and controlled a ranch of approximately 100 acres on O'Dell Creek in Madison County, Montana. Since the 1950s, Mr. Saunders has owned an interest in the ranch and today he retains a life estate in the property, with the remainder deeded to his son and daughters. His property encloses approximately three-quarters of a mile of O'Dell Creek, which is not, and historically has never been, commercially navigable. App. 4. O'Dell Creek flows within one-quarter mile of Mr. Saunders' home on his property. The

streambed and banks of the portion of O'Dell Creek flowing through Mr. Saunders' property are owned by Mr. Saunders because that portion of O'Dell Creek is non-navigable. App. 4. Not only does Mr. Saunders own title to the streambed and banks of O'Dell Creek on his property, he pays taxes on those lands.

The Stream Access Law provides that all surface waters in the state capable of recreational use may be so used by the public without regard to the ownership of the land underlying or adjacent to the waters. Mont. Code Ann. § 23-2-302; App. 32. The Stream Access Law allows recreational use up to the ordinary high-water mark of all non-navigable rivers and streams "capable of recreational use." *Id.*; App. 32. Recreational uses that are permitted include fishing, hunting, swimming, camping, floating, use of motorized watercraft, building fires below the high-water mark, and "related unavoidable or incidental uses." Mont. Code Ann. §§ 23-2-301(10); App. 32. The public is also given the right to "portage" around barriers or obstructions in the water by going above the high-water mark onto private property; portage around natural barriers, such as waterfalls, rocks, and fallen trees, is neither "lawful [n]or unlawful." Mont. Code Ann. § 23-2-311(4); App. 35.

Since the passage of the Stream Access Law, Montana Landowners may neither exclude others from their property nor prevent others from recreating on their property, including near their homes, buildings, and livestock. Montana Landowners have also suffered and continue to suffer, among other harms, disturbance of livestock, garbage left on the property, harassment or interference with Montana Landowners' attempts to use their own property, and urination and other acts of defecation on the

property as a result of the public access permitted by the Stream Access Law. Moreover, stream users build campfires and prepare meals, subjecting Montana Landowners' private property to the risk of forest and grass fires.

In addition, although Montana Landowners may no longer benefit financially from the use of their private property by the public, their neighbors and others can and do benefit financially. As a result of the Stream Access Law, outfitting businesses, including those operated by Intervenors, target high-quality properties and build their businesses on access to and use of Montana Landowners' properties. Thus, the natural beauty, privacy, security, and solitude that were the very reasons Montana Landowners purchased their properties have been spoiled.

## REASONS FOR GRANTING THE WRIT

### I. THE DECISION OF THE NINTH CIRCUIT IS IN DIRECT CONFLICT WITH DECISIONS BY THIS COURT.

#### A. This Court Has Preserved The Constitutional Protection Afforded A Person's Property By Both The Due Process Clause And The Takings Clause.

This Court has maintained a clear distinction between a substantive due process claim and a takings claim. In *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 315 (1987), this Court recognized that the Takings Clause "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." (Emphasis in

original; underlining added.) On the other hand, "the touchstone of [the Fourteenth Amendment's] [D]ue [P]rocess [Clause] is protection of the individual against arbitrary action of government." *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998). That is, the substantive due process guarantee protects against "deliberate decisions of government officials to deprive a person of life, liberty, or *property*," exercised arbitrarily and oppressively. *Collins v. Harker Heights*, 503 U.S. 115, 127 n. 10 (1992) (emphasis added); *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

More recently, five Justices of this Court preserved a person's substantive due process claim regarding his property even when he also asserted a takings claim. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 537-38 (1998) (plurality opinion); 524 U.S. at 539 (Kennedy, J., concurring in the judgment and dissenting in part); *see also, City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 754 n. 13 (1999) (Souter, J., concurring in part and dissenting in part).

### B. The Ninth Circuit Has Consistently Misinterpreted This Court's Ruling In *Graham v. Connor*.

In *Armendariz*, the Ninth Circuit held that, because the Takings Clause "provides an explicit source of constitutional protection against private takings," the Fifth Amendment is the sole source of relief for an arbitrary interference with property. *Armendariz*, 75 F.3d at 1324. The Ninth Circuit based that holding on this Court's ruling in *Graham v. Connor*, 490 U.S. 386 (1989). *Id.*; *accord*, *Macri v. King County*, 126 F.3d 1125, 1129 (9th Cir. 1997); *Buckles v. King County*, 191 F.3d 1127, 1137-38 (9th

Cir. 1999); *Esplanade Properties, LLC v. City of Seattle*, 307 F.3d 978, 982 (9th Cir. 2002). The Ninth Circuit's interpretation of *Graham* is in error.

In *Graham*, a criminal case, the plaintiff, a diabetic, sued seeking to recover damages for injuries allegedly sustained when law enforcement officers used physical force against him during an investigatory stop by alleging violations of his Fourteenth Amendment rights. *Graham*, 490 U.S. at 388. Rejecting lower federal courts' "indiscriminate[ ]" application of substantive due process analysis "to all excessive force claims lodged against law enforcement and prison officials under § 1983, without considering whether the particular application of force might implicate a more specific constitutional right," this Court held that, where a particular constitutional amendment provides an "explicit textual source of constitutional protection" against a particular sort of government behavior, that amendment, rather than the more general substantive due process guarantee, "must be the guide for analyzing these claims." *Graham*, 490 U.S. at 393, 395. However, *Graham* "does not hold that all constitutional claims relating to physically abusive government conduct must arise under either the Fourth or Eighth Amendments," thus preserving the protections afforded by the Due Process Clause. *County of Sacramento*, 523 U.S. at 843-44.

This Court has long recognized that claims may arise under either or both the Takings Clause and the Due Process Clause because those constitutional provisions address two different types of governmental conduct. A claim under the Takings Clause assumes the validity of the regulation but seeks just compensation for the property taken, while a substantive due process claim challenges the

validity of the regulation itself. *See United States v. Great Falls Mfg. Co.*, 112 U.S. 645, 656 (1884) (when an owner demands just compensation, he has accepted the validity of the taking); *City of Monterey*, 526 U.S. at 747 n. 7, 748 (Souter, J., concurring in part and dissenting in part) (a substantive due process claim asserts a "lack of authority. But this is not so in the usual case where damages are sought"; "inverse condemnation enforces payment for the owner's value in property *lawfully* taken" (emphasis added)).

Under the Takings Clause, the denial of just compensation, not the adoption of the regulation, gives rise to the constitutional violation; therefore, a claim seeking just compensation is the remedy. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194-95 (1985); *see also*, *First English*, 482 U.S. at 314 (The Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power."). In contrast, the remedy for the adoption of a regulation that constitutes an arbitrary exercise of governmental power in violation of the Due Process Clause of the Fourteenth Amendment "is not 'just compensation,' but invalidation of the regulation." *Id.* at 197.

Thus, since *Graham*, this Court has addressed, concurrently, the merits of both a Takings Clause claim and a Due Process Clause claim with regard to governmental interference with property. *See Concrete Pipe and Products of Calif., Inc. v. Construction Laborers Pension Trust for So. Calif.*, 508 U.S. 602, 636-47 (1993); *see also, College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673-75 (1999) (discussing, post-*Graham*, deprivation of property as a violation of the Due Process Clause of the Fourteenth Amendment). In

fact, this Court specifically rejected the Ninth Circuit's view that a court should look at the "dominant character" of the challenged conduct to determine the applicable constitutional standard:

> [W]e see no basis for doling out constitutional protections in such fashion. Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter the claim's "dominant" character. Rather, we examine each constitutional provision in turn.

*Soldal v. Cook County, Illinois*, 506 U.S. 56, 70 (1992).

Because the Ninth Circuit's decision conflicts with this Court's decisions, this Court should grant this Petition.

## II. THE DECISION OF THE NINTH CIRCUIT IS IN DIRECT CONFLICT WITH DECISIONS BY OTHER CIRCUITS.

### A. The Federal Circuit And The Eleventh Circuit Have Held Specifically That A Person's Property Is Protected By Both The Due Process Clause And The Takings Clause.

The Federal Circuit has held specifically that governmental interference with property rights gives rise to two separate constitutional causes of action:

> [I]f the government has taken property and has done so in a legally improper manner, it has committed two violations of the property-owner's rights. The two separate wrongs give rise to two

> separate causes of action, and the property-owner may elect to sue for just compensation *or to seek relief for the legal improprieties committed in the course of the taking.*

*Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1363-64 (Fed. Cir. 1998) (emphasis added). In *Del Rio Drilling*, federal oil and gas lessees sued the United States for an alleged taking when U.S. Department of the Interior officials denied drilling permits. *Id.* at 1360. Because there was an issue in the case as to whether the officials had authority to deny the permits, the Federal Circuit held that the plaintiffs could sue either in the Federal Court of Claims to obtain just compensation for a "taking" or in another forum to invalidate wrongful governmental conduct. *Id.* at 1363.

In *Villas of Lake Jackson, Ltd. v. Leon County*, 906 F. Supp. 1509, 1513-1521 (N.D. Fla. 1995), *aff'd*, 121 F.3d 610 (11th Cir. 1997), the district court held that a person properly raises a Due Process Clause claim when he asserts that the regulation that interferes with his property was not implemented for a rational, legitimate purpose, which leads to the invalidation of the regulation. *Id.* at 1515 n. 4. The district court further held that, on the other hand, a Takings Clause claim seeks just compensation only after admitting to the validity of the regulation. *Id.* Furthermore, the "property" protected by the Due Process Clause includes any subsidiary "property right" deprived by arbitrary state action. *Id.* at 1517.

The Eleventh Circuit affirmed the district court's decision, holding that "[a] landowner's vested rights created by state law may indeed constitute property subject to the arbitrary and capricious substantive due

process protections under the federal Constitution." *Villas of Lake Jackson*, 121 F.3d at 614.

### B. The First, Second, Third, Fourth, Fifth, Sixth, and Eighth Circuits Recognize That A Person's Property Is Protected By Both The Due Process Clause And The Takings Clause.

Seven Circuits have recognized that a person's property is protected by both the Due Process Clause and the Takings Clause. In *Simi Inv. Co., Inc. v. Harris County, Texas*, 236 F.3d 240, 247 (5th Cir. 2000), the Fifth Circuit held that the property owner's substantive due process claim was not subsumed by its Fifth Amendment takings claim: "Whatever the eventual fate of Simi's claim for compensation, Simi is entitled to use this court's authority to correct the county's continuing non-possessory interference with its land." *Id.* (quoting the district court). Furthermore, in *John Corp. v. City of Houston,* 214 F.3d 573, 581 (5th Cir. 2000), the Fifth Circuit held that "*Graham* applies if a constitutional claim is covered by a specific constitutional provision, and if a substantive due process claim is not so covered, it is to be analyzed using substantive due process standards;" *Graham* "does not mean [] that the applicability of the more explicit provision preempts due process protections." (Internal quotations omitted; citing *Lewis,* 523 U.S. at 842-44, and *Soldal,* 506 U.S. at 70.)

In *Montgomery v. Carter County, Tenn.*, 226 F.3d 758, 769-70 (6th Cir. 2000), the Sixth Circuit specifically declined to follow the Ninth Circuit's reasoning in *Armendariz*, describing the Ninth Circuit's holding in that case but holding that "[i]n addition to a Fifth Amendment

takings claim ... this circuit's precedents permit [the plaintiff] to assert [a] substantive due process [ ] claim[ ] as well." *See also, Pearson v. City of Grand Blanc,* 961 F.2d 1211, 1215 (6th Cir. 1992) (holding that under prevailing Sixth Circuit precedent, "the very existence of an allegedly unlawful zoning action, without more, makes a substantive due process claim ripe for federal adjudication").

In *South County Sand & Gravel Co., Inc. v. Town of South Kingstown*, 160 F.3d 834, 835-36 (1st Cir. 1998), the First Circuit, while noting that, based on *Graham*, "the Takings Clause, not substantive due process, would seem to supply the proper decisional framework," nevertheless held that "[our] recognition that substantive restrictions on public power may invalidate land use legislation if, for example, such legislation represents arbitrary or irrational action by lawmakers, comports with modern takings jurisprudence." The First Circuit then addressed the question presented by the plaintiff's claim: "whether the challenged legislation bears a rational connection to a legitimate public purpose." *South County Sand*, 160 F.3d at 836.

In *Sameric Corp. v. City of Philadelphia*, 142 F.3d 582, 595 (3rd Cir. 1998), the Third Circuit held that "in the context of a land use decision, the deliberate and arbitrary abuse of government power violates an individual's right to substantive due process." The Second Circuit, in *Kaluczky v. City of White Plains*, 57 F.3d 202, 211 (2nd Cir. 1995), recognized that "[s]ubstantive due process protects against government action that is arbitrary, conscience-shocking, or oppressive in the constitutional sense." In *Iowa Coal Min. Co. v. Monroe County, Iowa*, 257 F.3d 846, 853 (8th Cir. 2001), the Eighth Circuit addressed, without reference to *Graham*, the merits of a substantive due

process claim in the context of a land-use decision. The Fourth Circuit, in *Esposito v. South Carolina Coastal Council*, 939 F.2d 165, 170-71 (4th Cir. 1991), addressed the plaintiff's substantive due process claim on the merits.[1]

The Ninth Circuit's decision conflicts with the decisions of all other Circuits that have addressed this matter.[2] On this, the Ninth Circuit stands alone. This Court should grant this Petition to resolve this well-established and growing conflict.

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[1] The Seventh Circuit expressed doubt regarding, but did not explicitly reject, substantive due process claims in the context of claims relating to property. *Daniels v. Area Plan. Comm'n of Allen County*, 306 F.3d 445, 458 n. 14 (7th Cir. 2002) (citing *Armendariz* for the proposition that a private taking will be analyzed under the Takings Clause, but holding that "plaintiffs may maintain a substantive due process claim to contest land use decisions").

The Tenth Circuit, relying on *Graham*, held that a plaintiff's Fourteenth Amendment Due Process claim was subsumed into the plaintiff's Takings Clause claim but specifically declined to address whether a due process claim would always be subsumed by a takings analysis. *Miller v. Campbell County*, 945 F.2d 348, 352 (10th Cir. 1991). *Cf.*, *Signature Properties Intern. Ltd. Partnership v. City of Edmond*, 310 F.3d 1258, 1267-68 (10th Cir. 2002) (discussing ripeness of substantive due process claim).

[2] *See John Corp. v. City of Houston*, 214 F.3d 573, 582-83 (5th Cir. 2000), analyzing "the effect of *Graham*" by collecting and discussing cases, mostly from the Ninth Circuit, that have "used *Graham* to support considering a substantive due process claim as invoking the Takings Clause's protections" as well as the decisions from "a majority" of other Circuits that have declined to collapse due process claims into takings claims.

## CONCLUSION

For all of the above reasons, this Court should grant this Petition.

Respectfully submitted,

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Dated: March 24, 2003

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

HARVEY MADISON;
DORIS MADISON;
CHARLES D'AUTREMONT;
ELENA D'AUTREMONT;
HARRISON SAUNDERS,

*Plaintiffs-Appellants,*

v.

PATRICK J. GRAHAM, Director, Montana Department of Fish, Wildlife & Parks; STATE OF MONTANA DEPARTMENT OF FISH, WILDLIFE & PARKS; STAN MEYER, Commissioner; DAVID SIMPSON; CHARLES DECKER, Commissioner; DARLYNE DASHER; TIM MULLIGAN, Commissioner,

*Defendants-Appellees.*

MONTANA COALITION FOR STREAM ACCESS (MCSA); MONTANA WILDLIFE FEDERATION; MONTANA CHAPTER OF TROUT UNLIMITED (MTU); FISHING OUTFITTERS ASSOCIATION OF MONTANA (FOAM),

*Defendants-Intervenors-Appellees.*

No. 01-35145

D.C. No.
CV-00-00018-CCL

OPINION

Appeal from the United States District Court
for the District of Montana
Charles C. Lovell, District Judge, Presiding

Argued and Submitted
November 6, 2002 – Boise, Idaho

(Filed December 23, 2002)

Before: Stephen S. Trott, Thomas G. Nelson and
Sidney R. Thomas, Circuit Judges.

Opinion by Judge Trott

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## COUNSEL

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S. Amanda Koehler, Mountain States Legal Foundation, Denver, Colorado, for the appellants.

Brian M. Morris, Soliciter [sic], Montana Department of Justice, Helena, MT, for the defendants-appellees.

James H. Goetz, Bozeman, MT, for the intervenors-appellees.

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## OPINION

TROTT, Circuit Judge:

Harvey and Doris Madison, Charles and Elena d'Autremont, and Harrison Saunders (collectively "appellants") appeal from the district court's published decision dismissing their complaint with prejudice. The appellants sought to have Montana's Stream Access Law, Mont. Code Ann. §§ 23-2-301, *et seq.*, declared unconstitutional on the grounds that it (1) violated their Fourteenth Amendment

substantive due process rights, and (2) was void for vagueness. The district court held that (1) the appellants' substantive due process claim was in reality a Fifth Amendment takings claim, and (2) the appellants failed to properly challenge the statute on vagueness grounds. Accordingly, the district court dismissed the complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.[1] We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.[2]

## I

Because this case was dismissed for failure to state a claim, all allegations of material fact in the complaint are taken as true and construed in the light most favorable to the appellants. *Am. Family Ass'n, Inc. v. City and County of San Francisco,* 277 F.3d 1114, 1120 (9th Cir. 2002). The facts of this case are fully arrayed in the district court's opinion. *See Madison v. Graham,* 126 F. Supp. 2d 1320,

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[1] The district court found several other grounds for dismissal of the substantive due process claim; however, we need not address them because of our disposition of this case.

[2] Defendants contend that the district court lacked jurisdiction under the *Rooker-Feldman* doctrine. *See District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923). However, none of the plaintiffs in this litigation, save one, were parties to the relevant state proceeding. "The *Rooker-Feldman* doctrine does not bar the exercise of federal court jurisdiction when the federal court litigant was not a party to the state court action." *Southern California Edison Co. v. Lynch,* 307 F.3d 794, 805 (9th Cir. 2002) (citing *Johnson v. De Grandy,* 512 U.S. 997, 1006 (1994)). Thus, neither the district court nor this Court lacks jurisdiction over the claims of those plaintiffs who were not parties to the earlier state action.

1322-23 (D. Mont. 2001). We repeat only the facts necessary to understand the disposition of this case.

In 1985, the Montana Legislature enacted the Montana Stream Access Law. The law provides that "all surface waters that are capable of recreational use may be so used by the public without regard to the ownership of the land underlying the waters." Mont. Code Ann. § 23-2-302(1). The appellants' properties are crossed by streams which are non-navigable but are capable of recreational use. Under Montana law, the appellants own the streambeds underlying those streams. Mont. Code Ann. §§ 23-2-309, 22-2-322, 70-16-201. The general public uses those streams and streambeds for various recreational purposes, but under the Montana Stream Access Law the appellants are unable to restrict the public's use.

## II

## STANDARD OF REVIEW

A dismissal for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) is reviewed de novo. *Williamson v. Gen. Dynamics Corp.*, 208 F.3d 1144, 1149 (9th Cir. 2000).

## III

## DISCUSSION

### A. Substantive Due Process v. Takings

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV § 1.

The Takings Clause of the Fifth Amendment provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. The appellants alleged in their complaint that enforcement of the Montana Stream Access Law violates their substantive due process rights by infringing upon their liberty interests and fundamental rights, and they strenuously protest the construction of their complaint as a takings claim.

A close inspection of the complaint, however, reveals that the harms allegedly caused by the Montana Stream Access Law result from the appellants' inability under the law to exclude others from their property.[3] Thus, the issue

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[3] The relevant portions of the complaint allege:

¶ 23. Plaintiffs have suffered and continue to suffer from impaired property values. . . . [T]he recreational value of the property is impaired. For more than 25 years . . . Mr. Saunders and his family leased the right to use the stream and the streambed on his property for $4000 up to $11,500 per year. As a result of the Stream Access Law, Mr. Saunders is no longer able to earn this substantial amount toward his retirement from use of his property by others.

¶ 24. Plaintiffs may not exclude others from their property nor prevent others from recreating on their property near their home, buildings, and livestock. . . .

¶ 25. Plaintiffs have lost the inalienable right to acquire, possess, and protect property. . . .

¶ 26. Plaintiffs have been subject to frequent and repeated trespasses on their properties, which the State is unable to stop or prevent due to the remote nature of the properties. Plaintiffs have also suffered and continue to suffer, among other harms, disturbance of livestock, garbage left on the property, harassment or interference with Plaintiffs' attempts to use their own property, and urination and other acts of defecation on the property. . . .

(Continued on following page)

we address is whether a claim that a statute precludes private property owners from excluding others from their property must be analyzed under the Fifth Amendment's Takings Clause, or whether the analysis falls under the more generalized notions of substantive due process. We hold that the claim falls under the Takings Clause.

The United States Supreme Court has declared that the right of landowners to exclude others from their property represents "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982). The appellants recognized this well-established principle in their complaint, stating that "[t]he power to exclude others is the hallmark of a private property interest, an essential component of private property rights."

This court has previously held that claims alleging governmental interference with property rights fall under the Fifth Amendment's Takings Clause. *Armendariz v. Penman*, 75 F.3d 1311, 1324 (9th Cir. 1996) (en banc). Applying the principles announced by the Supreme Court

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In addition, stream users build campfires and prepare meals, subjecting Plaintiffs' private property to the risk of forest and grass fires.

* * *

¶ 29. .... The d'Autremonts' property has been and continues to be the subject of advertisements and profit for a neighboring outfitter. Outfitting businesses and others regularly benefit financially from use of the Madisons' and Mr. Saunders' properties.

in *Graham v. Connor,* 490 U.S. 386 (1989),[4] we held that because the "Takings Clause provides an explicit textual source of constitutional protection against private takings, the Fifth Amendment (as incorporated by the Fourteenth), not the more generalized notion of substantive due process, must be the guide in reviewing the plaintiffs' claim of a private taking." *Armendariz,* 75 F.3d at 1324 (internal quotation marks omitted).

Since deciding *Armendariz,* this court has consistently held that substantive due process claims are precluded where the alleged violation is addressed by the explicit textual provisions of the Fifth Amendment's Takings Clause. *See, e.g., Esplanade Properties, LLC v. City of Seattle,* 307 F.3d 978, 983 (9th Cir. 2002) (affirming dismissal of federal substantive due process claim); *Macri v. King County,* 126 F.3d 1125, 1129 (9th Cir. 1997) (stating that appellants cannot sidestep *Armendariz* by recharacterizing their claim as lying solely in substantive due process).

The appellants contend that because they seek only declaratory and injunctive relief their claim cannot be understood as a takings claim. This contention is without merit. Landowners are allowed to seek such equitable relief in order to resist takings that threaten to violate the Constitution. *See Daniel v. County of Santa Barbara,* 288

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[4] The Supreme Court reviewed an excessive use of force claim against police officers and held that "because the Fourth Amendment provides an explicit textual source of constitutional protection . . . [the Fourth] Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Graham,* 490 U.S. at 395.

F.3d 375, 384-85 (9th Cir. 2002) (reviewing a takings claim seeking injunctive and declaratory relief).

The appellants contend also that *Armendariz* has no precedential value (1) after the Supreme Court's decision in *Eastern Enterprises v. Apfel,* 524 U.S. 498 (1998), and (2) because *Armendariz* addressed a "private" taking, not a public taking. However, we recently held in *Esplanade Properties,* 307 F.3d at 982-83, a *public* takings case, that *Eastern Enterprises* did not undermine the precedential value of our holding in *Armendariz.* We explained:

> In [*Eastern Enterprises*], a majority of the Court held that the Coal Industry Retiree Health and Benefit Act ("Coal Act"), 26 U.S.C. §§ 9701-9722 (1994 ed. and Supp. II), which established a mechanism for providing health benefits to coal industry retirees and their dependents, was unconstitutional. The plaintiff asserted that the Coal Act violated its substantive due process rights and constituted a taking of property in violation of the Fifth Amendment. *Eastern Enters.,* 524 U.S. at 517, 118 S.Ct. 2131. Justice O'Connor, writing for four Justices, held that the Coal Act violated the Takings Clause, but explicitly declined to address "Eastern's due process claim." *Id.* at 538, 118 S.Ct. 2131.
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> [O]f the five Justices constituting the majority, only Justice Kennedy, in concurrence, addressed the due process claim, and he addressed it to the exclusion of the takings claim. The four Justices in dissent decided that the plaintiff had neither a takings claim nor a substantive due process claim. For that reason alone there exists no conflict between the reasoning of the Court in

> *Eastern Enterprises* and our holding in *Armendariz.*

*Id.* (internal citation omitted).

Because the right to exclude others is a private property right, appellants have alleged harms addressed exclusively by the Fifth Amendment's Takings Clause. Because the "Takings Clause provides an explicit textual source of constitutional protection" of private property rights, "the Fifth Amendment (as incorporated by the Fourteenth), not the more generalized notion of substantive due process, must be the guide in reviewing the plaintiffs' claim." *Armendariz,* 75 F.3d at 1324. However, in light of the appellants' steadfast disclaimer that they do not rely on the Takings Clause as the predicate for this lawsuit, we do not construe their claims as takings claims. This leads to the inevitable conclusion that not only did the appellants fail adequately to allege a substantive due process claim, but also that the district court correctly dismissed their complaint with prejudice.

### B. Void-for-Vagueness

The appellants argue that the Montana Stream Access Law is unconstitutionally vague because the state legislature chose to address the legality of portage around *artificial* barriers in the streams but not the legality of portage around *natural* barriers. The district court held that the appellants void-for-vagueness claim failed (1) because a vagueness challenge is not proper when the legislature merely failed to enact a law, and (2) because the appellants "failed to allege in their complaint that there are any natural barriers within their streambeds that cause recreationalists to portage beyond the ordinary

high water mark." *Madison,* 126 F. Supp. 2d at 1327. We address only the second reason.

"It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand." *United States v. Mazurie,* 419 U.S. 544, 550 (1975). In ruling on the motion to dismiss, the district court acted within its discretion in refusing to consider facts asserted in an affidavit presented by the appellants.[5] *Isquith v. Middle S. Utils., Inc.,* 847 F.2d 186, 193 n.3 (5th Cir. 1988). The appellants' failure to allege the existence of natural barriers in the streams crossing their property precludes their vagueness claim. Even if they had alleged proper facts, we see nothing vague about the statute. The state legislature simply decided not to address the issue of natural barriers.

## CONCLUSION

The appellants alleged facts that give rise only to a takings claim. Their attempt to avoid "takings" analysis by labeling the claim as substantive due process does not change the claim's nature. The right to exclude others from private property is a property right addressed by the Takings Clause of the Fifth Amendment. Under the principles adopted in *Armendariz* and its progeny, the appellants cannot bring a substantive due process claim for the harms they alleged. The appellants likewise have

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[5] The affidavit declared that the bank on one side of the stream was 100 feet tall, but did not allege the existence of any barrier within the streambed.

failed properly to plead the facts necessary to support their void-for-vagueness claim. The district court correctly dismissed the appellants' complaint with prejudice.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

HELENA DIVISION

* * *

HARVEY and DORIS MADISON, CHARLES and ELENA D'AUTREMONT, and HARRISON SAUNDERS,

Plaintiffs,

-v-

PATRICK J. GRAHAM, Director, Montana Department of Fish, Wildlife & Parks; MONTANA FISH, WILDLIFE & PARKS COMMISSION; and STAN MEYER, DAVID SIMPSON, CHARLES DECKER, DARLYNE DASHER, and TIM MULLIGAN, Commissioners,

Defendants,

MONTANA WILDLIFE FEDERATION, MONTANA CHAPTER OF TROUT UNLIMITED, FISHING OUTFITTERS ASSOCIATION OF MONTANA, and MONTANA COALITION FOR STREAM ACCESS,

Defendant-Intervenors.

CV 00-18-H-CCL

OPINION AND ORDER

(Filed Jan. 4, 2001)

* * *

Before the court are the motions to dismiss filed by the State Defendants and the Defendant-Intervenors. These motions came on regularly for hearing on December 13, 2000. The court heard argument by William Perry Pendley for the Plaintiffs, by Stephen C. Bullock for the State Defendants, and by James H. Goetz for the Defendant-Intervenors. The court, having considered the briefs filed by the parties and the arguments made at hearing, is prepared to rule.

Plaintiffs seek by their Complaint to enjoin the State Defendants permanently from enforcing the Montana Stream Access Law with regard to privately owned streambeds and banks underlying the Stillwater and Ruby Rivers and O'Dell Creek, historically non-navigable waters in the State of Montana.[1] Plaintiffs' First Claim asserts that the Stream Access Law violates their 14th Amendment right to substantive due process. In the alternative, Plaintiffs' assert the same due process claim pursuant to 42 U.S.C. § 1983. Plaintiffs' Second Claim asserts that the Stream Access law violates their right to due process because it is void for vagueness.

The court's analysis of these issues starts with their legal history beginning in 1972 when Montana adopted a new Montana Constitution, which some feared could

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[1] *See* Mont. Code Ann. §§ 23-2-301, et seq. (1999). With certain restrictions, the Montana Stream Access law provides that "all surface waters that are capable of recreational use may be so used by the public without regard to the ownership of the land underlying the waters." Mont. Code Ann. § 23-2-302(1).

infringe upon rights vested and existing under the prior 1889 Montana Constitution and the substantial body of law decided thereunder.

The 1972 Montana Constitution contained this new and significant provision:

> All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

Article IX, Section 3(3).

Then, in 1984, the Montana Supreme Court examined a claim of plaintiff Montana Coalition for Stream Access, Inc. against defendant Dennis Curran, who owned private property bordering some six to seven miles of the Dearborn River and who claimed a right to restrict its use. *Montana Coalition for Stream Access v. Curran,* 682 P.2d 163 (1984). Plaintiff claimed that the Dearborn River is a public way and that the public possesses a right to use the river for recreational uses, up to the high water mark on defendant Curran's private property. Although the Dearborn River had always been considered a navigable river for purposes of federal title analysis, and therefore it was never in doubt that the State of Montana had legal title to the Dearborn's streambed, nevertheless the court proceeded to consider the effect of the new surface water provision of the 1972 Montana Constitution. Relying on the 1972 Montana Constitution and upon the Public Trust Doctrine, the Montana Supreme Court held that "any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes."

*Montana Coalition for Stream Access v. Curran,* 682 P.2d 163, 171 (Mont. 1984).

Several months later, the Montana Supreme Court decided *Montana Coalition for Stream Access v. Hildreth,* 684 P.2d 1088 (Mont. 1984), in which plaintiff challenged defendant Hildreth's attempt to close 1.5 miles of the Beaverhead River to public use. The district court found for plaintiff and declared that the Beaverhead River was subject to public access up to the high water mark of Hildreth's lands. On appeal, the Montana Supreme Court affirmed the district court, citing *Curran* and the surface water provision of the 1972 Montana Constitution, and declared that the public had a right to recreational use of the streambed and banks of the Beaverhead River up to the ordinary high water mark. *Id.* at 1094.

Next, in 1985, after much political compromise, the Montana Legislature enacted the Stream Access Law, Mont. Code Ann. §§ 23-2-301, et seq., for the purpose of codifying Montana law regarding recreational use of Montana streams. The constitutionality of the Stream Access Law was challenged by several property owners (among them one of the Plaintiffs in the instant case, Harrison Saunders) in *Galt v. State, Dept. of Fish, Wildlife & Parks,* 731 P.2d 912 (Mont. 1987) (*"Galt I"*). Although certain minor provisions of the Stream Access Bill were found to be unconstitutional, in the main the Montana Supreme Court found that "the balance of the statutory scheme accords with the Montana Constitution and the opinion of [the] Court." *Id.* at 916. *Galt I* made clear that although property owners might well possess title to the streambeds of streams running through their properties, such a "fee [is] impressed with a dominant estate in favor of the public." *Id.* The Montana Supreme Court therefore

maintained its interpretation of the 1972 Montana Constitution and the Public Trust Doctrine, as earlier stated in *Curran* and *Hildreth,* that the public's right to use state-owned water for recreation imposes a narrowly-confined public easement over the bed and banks of Montana streams owned by private individuals.

Significantly, for purposes of the instant case, the *Galt I* Plaintiffs failed to attempt to appeal this decision to the United States Supreme Court, as they would have done had they desired to challenge the Montana Supreme Court's holding of the constitutionality of the Montana Stream Access Law.

In the instant case, the State Defendants move to dismiss the Plaintiffs' Complaint on the grounds that (1) the Complaint is actually founded in the Takings Clause of the Fifth Amendment, as applied to the states through the 14th Amendment, and this explicit textual source of constitutional authority overrides the claim of substantive due process, (2) under the Fifth Amendment Takings Clause, the test is whether the stream access laws are rationally related to a legitimate state interest and are therefore a valid exercise of police power, (3) even viewed as having a 14th Amendment Substantive Due Process claim, Plaintiffs have failed to carry their burden of showing that there is no conceivable public purpose for Montana's Stream Access laws, and (4) the Montana Stream Access law's failure either to permit or to proscribe portage around natural barriers is not a violation of the vagueness doctrine, and the law's definition of high water

mark is not vague.[2] Thus, the State Defendants assert that there has been no constitutional violation, and Plaintiffs have failed to state a claim upon which relief can be granted.

The Defendant-Intervenors move to dismiss the Complaint on the grounds that (1) Montana's three-year statute of limitations has elapsed, (2) Plaintiffs' claims are barred by res judicata, (3) the Full Faith and Credit statute requires that the court honor a previous adjudication of the constitutionality of Montana's Stream Access Law, and (4) the Rooker-Feldman Doctrine bars federal district court review of Montana Supreme Court cases.

Taking up the State Defendants' motion to dismiss, the court finds that the State Defendants question whether Plaintiffs have properly framed the issues to be decided and assert that the Complaint's First Claim for Relief is really a Fifth Amendment takings claim. The State Defendants suggest that Plaintiffs seek to avoid framing it thus either because Plaintiffs have failed to exhaust their state remedies or because Plaintiffs cannot

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[2] Mont. Code Ann. § 23-2-311(4) provides that "[n]othing contained in this part addresses the issue of natural barriers or portage around said barriers, and nothing contained in this part makes such portage lawful or unlawful."

The "ordinary high water mark" is defined at Mont. Code Ann. § 23-2-301(9) as "the line that water impresses on land by covering it for sufficient periods to cause physical characteristics that distinguish the area below the line from the area above it. Characteristics of the area below the line include, when appropriate, but are not limited to deprivation of the soil of substantially all terrestrial vegetation and destruction of its agricultural vegetative value. A flood plain adjacent to surface waters is not considered to lie within the surface waters' high-water marks."

meet the applicable Fifth Amendment takings claim standard.

Indeed, Ninth Circuit precedent does require that this court view Plaintiffs First Claim as a Fifth Amendment takings claim rather than a 14th Amendment substantive due process claim. *Armendariz v. Penman,* 75 F.3d 1311 (9th Cir. 1996) (en banc) (substantive due process claim not actionable when explicit textual protection under takings or just compensation clause of the Fifth Amendment are available, regardless whether a takings claim has merit); *see also Macri v. King County,* 126 F.3d 1125 (9th Cir. 1997) (public takings claim); *Sinclair Oil v. County of Santa Barbara,* 96 F.3d 401 (9th Cir. 1996) (public takings claim). An as-applied Fifth Amendment takings claim would require exhaustion of state remedies, i.e., presentment and denial, prior to being asserted in federal court. *See Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 195 (1985).

The applicable test under the Fifth Amendment Takings Clause would require Plaintiffs to show that Montana's Stream Access Law either does not substantially advance legitimate state interests or denies a property owner all economically viable use of his land. *See Nollan v. California Coastal Commission,* 483 U.S. 825, 834 (1987) (citing *Agins v. Tiburon,* 447 U.S. 255, 260 (1980)). Perplexingly enough, Plaintiffs rely heavily on two Fifth Amendment Takings Clause cases, *Nollan* and *Dolan v. City of Tigard,* 512 U.S. 374, to support their substantive due process argument. *Nollan* is a classic takings case involving the governmental extraction of a public easement across a private beach, whereas in the instant case we are discussing use of a public water resource in ways not necessarily involving any easement over private land

at all. For example, in the case of floaters on Montana streams, there is no public touching of the private streambed but only public use of a public resource. In this example, the private landowner cannot be viewed logically as having any right to exclude a floater from a Montana stream, regardless of the fact that the public water passes over a private streambed. The court acknowledges that not all users of the public resource float on the water, however, but the extent of the touching of the private streambed by a wader, for example, is de minimis and causes no more interference with private property rights than does a floater. Furthermore, the interest and intent of the public is to appropriate and use the surface water, not the private streambed. To the extent that the surface of the water is not subject to appropriation and use by the public, there is no right to the use of the private streambed, since this is an incidental de minimis appurtenance entirely dependent upon use of the surface of the water. These facts are very different from the facts of *Nollan,* where the public desired an easement to walk across a private beach.

Similarly, in *Dolan,* the Supreme Court found that an uncompensated taking had occurred when a shop owner applied for a permit to expand her store and was required, in exchange for the permit, to dedicate a portion of her land for use as a pedestrian path. Because there was no logical relationship between the pedestrian pathway and the expansion of the business, the court applied a heightened scrutiny standard and found that the regulatory action masked an uncompensated taking. *Dolan,* 512 U.S. at 395-96. Unlike the facts in *Dolan,* however, in the instant case no private property right is being extracted from Plaintiffs in exchange for their receipt of a discretionary benefit. In fact, the public has no interest at all in

the private streambed *per se,* but only in the publicly-owned surface waters that traverse the streambed. The cases cited by Plaintiffs, therefore, being "unconstitutional conditions" cases, are distinguishable from the facts presented by Plaintiffs' Complaint.

Yet the State Defendants argue that Montana does have a legitimate state interest in public recreational use of a public resource such as Montana's streams. The State Defendants point out that the Montana Stream Access Law substantially advances a legitimate state interest and does not cause Plaintiffs to lose all economically viable use of their property. Notwithstanding the State Defendants argument that the Stream Access Law is defensible under the Fifth Amendment, the court is mindful of the fact that a Fifth Amendment Takings Claim is not asserted by Plaintiffs' Complaint and is not before this court.

However, even if Plaintiffs correctly frame their First Claim for Relief as a violation of substantive due process, the standard only becomes more demanding. Because Plaintiffs do not assert a fundamental right[3], the statute about which they complain is reviewed under a rational basis standard. *Halverson v. Skagit County,* 42 F.3d 1257, 1262 (9th Cir. 1994). To prevail on this substantive due process claim, Plaintiffs must prove that the statute imposing the property restriction is so irrational and arbitrary that the state could have no conceivable public purpose relating to public health, safety, morals, or

[3] Fundamental rights in the substantive due process context are those that pertain to marriage, family, procreation, and the right to bodily integrity. *See Albright v. Oliver,* 510 U.S. 266, 271 (1994).

general welfare. *Dodd v. Hood River County,* 59 F.3d 852, 864 (9th Cir. 1995). In essence, Plaintiffs must show that Montana could have no rational reason for enacting Montana's Stream Access Law. *See Halverson,* 42 F.3d at 1262. It is not even helpful to Plaintiffs if they could show that the law actually fails to advance its alleged purposes; the legislation need only be *intended* by the legislature to advance a public purpose. *Wedges/Ledges of California, Inc. v. City of Phoenix,* 24 F.3d 56, 66 (9th Cir. 1994). It is abundantly clear that Plaintiffs cannot show that the Stream Access Law has no public purpose, and in point of fact Plaintiffs have not made any real effort so to do. As counsel for the State Defendants asserted in oral argument, there are numerous, obvious, rational reasons for Montana's Stream Access laws, *viz.,* the public's desire to use Montana's streams for recreation, the promotion of Montana's economy through tourism, and the management of Montana's natural resources and wildlife.

Thus, whether viewed as a Fifth Amendment Takings Claim or as a Fourteenth Amendment Substantive Due Process Claim, it is apparent that Plaintiffs have failed to state a claim upon which relief can be granted, for the reason that Montana's Stream Access Law clearly and substantially advances a legitimate government interest and cannot be said to be irrational or arbitrary, certainly not in the sense of being without any conceivable public purpose. It is even doubtful whether the Stream Access Law results in a taking in the first place, given that it relates primarily to public activities on a public way, i.e., the recreational use of Montana's surface waters.

Moreover, as the Defendant-Intervenors caution, there are several reasons why Plaintiffs' Complaint is not properly placed before this federal district court. For

example, even if Plaintiffs' claims were meritorious, it appears to the court that Plaintiffs have slept on their rights far too long, having missed the three-year general tort limitations deadline by approximately twelve years. *See* Mont. Code Ann. § 27-2-204(1). As noted by the court during oral argument, Plaintiffs had notice of the potential loss of a property interest upon passage of Article IX, Section 3(3) of the 1972 Montana Constitution. In 1985, the Montana legislature relied largely upon the 1972 Montana Constitution to enact the Stream Access Law, Mont. Code Ann. § 23-2-301, et seq. Plaintiffs allowed these two major legal events to pass without challenge, and may not now be heard to complain decades after the fact. Moreover, the statute of limitations bar applies whether Plaintiffs are permitted to go forward with a direct substantive due process claim or the alternative section 1983 action. *Ward v. Caulk,* 650 F.2d 1144 (9th Cir. 1981).

Likewise, the Plaintiffs' argument in favor of a continuing violation exception is without merit. The Plaintiffs allege that passage of the 1985 Stream Access Law violated their constitutional rights, and although Plaintiffs may continue to suffer ill effects from the passage of that law, the legislature has not tolled the statute of limitations by continuing acts. *Id.* at 1147; *see also County Estates Homeowners' Association, Inc. v. McMillan,* 276 Mont. 100, 915 P.2d 806, 808 (Mont. 1996); *see also Kuhnle Brothers, Inc. v. City of Geauga,* 103 F.3d 516 (6th Cir. 1997)

(continuing violation exception applied to liberty claims not property claims).[4]

It is not unfair that Plaintiffs should be precluded from seeking full adjudication of the merits of the Stream Access Law, not only because they have waited overly long, but also because a full adjudication has already been performed by a competent court having proper jurisdiction. Thus, Defendant-Intervenors assert the bar of res judicata based upon the Montana Supreme Court's decision in *Galt v. State, Dept. of Fish, Wildlife & Parks,* 731 P.2d 912 (Mont. 1987) (*Galt I*).

In *Galt I,* a similar group of landowners (including one of the Plaintiffs, Harrison Saunders) did challenge the 1985 Montana Stream Access Law. Their challenge was described by the Montana Supreme Court as follows: The *Galt I* plaintiffs challenged the Montana Stream Access Law "as a taking of private property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article II, § 29 of the Montana Constitution." *Galt v. State, Dept. of Fish, Wildlife & Parks,* 749 P.2d 1089, 1090 (Mont. 1988) ("*Galt II*") (attorney fees phase of *Galt I*). Clearly, the *Galt I* plaintiffs sought an adjudication of their federal constitutional rights as well as their rights under the Montana

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[4] Plaintiffs are uncertain about whether they believe that the right to exclude others is a liberty/privacy interest or a property interest. This question has been answered on numerous occasions, however, by the United States Supreme Court, as in *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 433 (1982), which holds that the right to exclude others is 'one of the most essential sticks in the bundle of rights that are commmonly characterized as property.'

Constitution. No *England* reservation [5] was made by the *Galt I* plaintiffs, and therefore Plaintiff Harrison Saunders is barred by res judicata. Plaintiffs Madisons and D'Autremonts are barred by res judicata through the Full Faith and Credit Statute [6] under the theory of virtual representation. *See Los Angeles Branch NAACP v. Los Angeles Unified School Dist.*, 750 F.2d 731 (9th Cir. 1985) (en banc); *see also Aetna Life & Cas. Inc. Co. v. Johnson*, 673 P.2d 1277 (1984).

Even if this court were not to apply the *res judicata* bar or the statute of limitations bar to Plaintiffs' Complaint, the Plaintiffs would still be precluded from asserting their claims by the Rooker-Feldman Doctrine. By this argument, Defendant-Intervenors assert that Plaintiffs may not seek federal appellate review of the *Galt I* decision in this federal district court. "The Rooker-Feldman doctrine provides that 'federal district courts lack subject matter jurisdiction to review final adjudications of a state's highest court or to evaluate constitutional claims that are 'inextricably intertwined with the state court's [decision] in a judicial proceeding.'" *FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 834, 840 (3rd Cir.

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[5] *See England v. Louisiana State Bd. Of Medical Examiners*, 375 U.S. 411 (1964).

[6] 28 U.S.C. § 1738 provides in part that "[s]uch Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." The preclusive effect of a state court judgment is determined by examination of the rendering state's laws. *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244 (9th Cir. 1992).

1996) (quoting *Blake v. Papadakos,* 953 F.2d 68, 71 (3rd Cir. 1992) (internal citation omitted)). The essence of the Rooker-Feldman doctrine is that federal district courts must not conduct appellate review of a state court decision. The proper federal review of the *Galt I* case could have been performed by the United States Supreme Court, but the *Galt I* plaintiffs did not appeal the Montana Supreme Court's decision. While the *Galt I* decision lacks specificity in its reasoning as to the federal and state constitutional claims, "a paucity of explicit analysis in the court's opinion will not strip the holding of its validity for purposes of Rooker-Feldman's jurisdictional bar." *Gulla v. North Strabane Township,* 146 F.3d 168, 172 (3rd Cir. 1998).[7] After reviewing the major federal and state constitutional challenges to the Stream Access Law, the *Galt I* court found the Law to be constitutional, except for a few provisions. This federal district court cannot now undertake a review of that decision, and adjudication of Plaintiffs' Complaint would effectively require this court to do just that.

The federal Rooker-Feldman doctrine deprives this court of jurisdiction over the Plaintiffs' First Claim for Relief (or alternate First Claim), but even if that were not the case, the First Claim for Relief is barred by the statute of limitations and res judicata.

Plaintiffs' Second Claim for Relief fares no better. On its face, Plaintiffs' Second Claim fails to point to a statute

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[7] In fact, the decision in *Galt I* is similar to that of the lower court in *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983), in that an overarching decision implicitly denies all of the plaintiffs' claims.

that "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. . . ." *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926). Plaintiffs complain instead that the Stream Access Law fails to state whether or not recreationalists are to be allowed to portage around natural barriers. *See* Mont. Code Ann. § 23-2-311(4). First, this is not a proper constitutional challenge on vagueness grounds because Plaintiffs are really complaining about the legislature's failure to enact a law, and, second, Plaintiffs have failed to allege in their complaint that there are any natural barriers within their streambeds that cause recreationalists to portage beyond the ordinary high water mark.[8] Nor does Plaintiffs' complaint that "ordinary high water mark" is ill-defined persuade the court that the statute is vague. *See* Mont. Code Ann. § 23-2-301(9). The definition is reasonably precise and easily understood.

Accordingly, for all of the reasons described above,

IT IS HEREBY ORDERED that the State Defendant's Motion to Dismiss is GRANTED.

IT IS FURTHER ORDERED that the Defendant-Intervenors' Motion to Dismiss is GRANTED.

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[8] The court rejects Plaintiffs' attempt to assert facts not in the complaint by affidavit in response to the State's motion to dismiss. However, I pointed out during argument that nothing in the Stream Access Law authorizes floaters to trespass on adjacent lands beyond the high water mark, in the absence of natural barriers in the stream. The State's counsel agreed with the court's observation and remarked that the remedies of the trespass laws were available to Plaintiffs to prevent the claimed wrongs.

IT IS FURTHER ORDERED that Plaintiffs' Complaint is DISMISSED with prejudice. Let judgment enter.

The Clerk is directed to notify the parties forthwith of entry of this order.

Done and dated this 4th day of January, 2001.

/s/ Charles C. Lovell
CHARLES C. LOVELL
Senior United States
District Judge

**UNITED STATES DISTRICT COURT**

HELENA DIVISION DISTRICT OF MONTANA

HARVEY and DORIS MADISON, CHARLES and ELENA D'AUTREMONT, and HARRISON SAUNDERS,

Plaintiffs,

V.

PATRICK J. GRAHAM; MONTANA DEPT OF FISH, WILDLIFE & PARKS, et al.,

Defendants.

**JUDGMENT IN A CIVIL CASE**

CASE NUMBER: **CV-00-18-H-CCL**

(Filed Jan. 4, 2001)

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

State Defendant's Motion to Dismiss having been GRANTED, and Defendant-Intervenors' Motion to Dismiss having been GRANTED,

IT IS ORDERED AND ADJUDGED that Plaintiff's Complaint is DISMISSED with prejudice, that the Plaintiffs take nothing thereby, and that all relief is denied.

**January 4, 2001**
*Date*

/s/ **LOU ALEKSICH, JR.**
*Clerk*

/s/ Dianne E. Mantz
*(By) Deputy Clerk*

## CONSTITUTIONAL PROVISIONS

Amendment V, U.S. Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

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Amendment XIV, U.S. Constitution

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

## MONTANA ANNOTATED CODE

**23-2-301. Definitions. For purposes of this part, the following definitions apply:**

(1) "Barrier" means an artificial obstruction located in or over a water body, restricting passage on or through the water, which totally or effectively obstructs the recreational use of the surface water at the time of use. A barrier may include but is not limited to a bridge or fence or any other manmade obstacle to the natural flow of water.

(2) "Class I waters" means surface waters, other than lakes, that:

(a) lie within the officially recorded federal government survey meander lines thereof;

(b) flow over lands that have been judicially determined to be owned by the state by reason of application of the federal navigability test for state streambed ownership;

(c) are or have been capable of supporting the following commercial activities: log floating, transportation of furs and skins, shipping, commercial guiding using multiperson watercraft, public transportation, or the transportation of merchandise, as these activities have been defined by published judicial opinion as of April 19, 1985; or

(d) are or have been capable of supporting commercial activity within the meaning of the federal navigability test for state streambed ownership.

(3) "Class II waters" means all surface waters that are not class I waters, except lakes.

(4) "Commission" means the fish, wildlife, and parks commission provided for in *2-15-3402*.

(5) "Department" means the department of fish, wildlife, and parks provided for in *2-15-3401*.

(6) "Diverted away from a natural water body" means a diversion of surface water through a manmade water conveyance system, including but not limited to:

(a) an irrigation or drainage canal or ditch;

(b) an industrial, municipal, or domestic water system, excluding the lake, stream, or reservoir from which the system obtains water;

(c) a flood control channel; or

(d) a hydropower inlet and discharge facility.

(7) "Lake" means a body of water where the surface water is retained by either natural or artificial means and the natural flow of water is substantially impeded.

(8) "Occupied dwelling" means a building used for a human dwelling at least once a year.

(9) "Ordinary high-water mark" means the line that water impresses on land by covering it for sufficient periods to cause physical characteristics that distinguish the area below the line from the area above it. Characteristics of the area below the line include, when appropriate, but are not limited to deprivation of the soil of substantially all terrestrial vegetation and destruction of its agricultural vegetative value. A flood plain adjacent to surface waters is not considered to lie within the surface waters' high-water marks.

(10) "Recreational use" means with respect to surface waters: fishing, hunting, swimming, floating in small craft or other flotation devices, boating in motorized craft unless otherwise prohibited or regulated by law, or craft propelled by oar or paddle, other water-related pleasure activities, and related unavoidable or incidental uses.

(11) "Supervisors" means the board of supervisors of a soil conservation district, the directors of a grazing district, or the board of county commissioners if a request pursuant to *23-2-311*(3)(b) is not within the boundaries of a conservation district or if the request is refused by the board of supervisors of a soil conservation district or the directors of a grazing district.

(12) "Surface water" means, for the purpose of determining the public's access for recreational use, a natural water body, its bed, and its banks up to the ordinary high-water mark.

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**23-2-302. Recreational use permitted – limitations – exceptions. (1) Except as provided in subsections (2) through (5), all surface waters that are capable of recreational use may be so used by the public without regard to the ownership of the land underlying the waters.**

(2) The right of the public to make recreational use of surface waters does not include, without permission or contractual arrangement with the landowner:

(a) the operation of all-terrain vehicles or other motorized vehicles not primarily designed for operation upon the water;

(b) the recreational use of surface waters in a stock pond or other private impoundment fed by an intermittently flowing natural watercourse;

(c) the recreational use of waters while diverted away from a natural water body for beneficial use pursuant to Title 85, chapter 2, part 2 or 3, except for impoundments or diverted waters to which the owner has provided public access;

(d) big game hunting except by long bow or shotgun when specifically authorized by the commission;

(e) overnight camping within sight of any occupied dwelling or within 500 yards of any occupied dwelling, whichever is less;

(f) the placement or creation of any permanent duck blind, boat moorage, or any seasonal or other objects within sight of or within 500 yards of an occupied dwelling, whichever is less; or

(g) use of a streambed as a right-of-way for any purpose when water is not flowing therein.

(3) The right of the public to make recreational use of class II waters does not include, without permission of the landowner:

(a) big game hunting;

(b) overnight camping;

(c) the placement or creation of any seasonable object; or

(d) other activities which are not primarily water-related pleasure activities as defined in *23-2-301*(10).

(4) The right of the public to make recreational use of surface waters does not grant any easement or right to the public to enter onto or cross private property in order to use such waters for recreational purposes.

(5) The commission shall adopt rules pursuant to *87-1-303*, in the interest of public health, public safety, or the protection of public and private property, governing recreational use of class I and Class II waters. These rules must include the following:

(a) the establishment of procedures by which any person may request an order from the commission:

(i) limiting, restricting, or prohibiting the type, incidence, or extent of recreational use of a surface water; or

(ii) altering limitations, restrictions, or prohibitions on recreational use of surface water imposed by the commission;

(b) provisions requiring the issuance of written findings and a decision whenever a request is made pursuant to the rules adopted under subsection (5)(a); and

(c) a procedure for the identification of streams within class II waters which are not capable of recreational use or are capable of limited recreational use, and a procedure to restrict the recreational use to the actual capacity of the water.

(6) The provisions of this section do not affect any rights of the public with respect to state-owned lands that are school trust lands or any rights of lessees of such lands.

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**23-2-303 through 23-2-308 reserved.**

**23-2-309. Land title unaffected. The provisions of this part and the recreational uses permitted by *23-2-302* do not affect the title or ownership of the surface waters, the beds, and the banks of any navigable or nonnavigable waters or the portage routes within this state.**

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**23-2-310. Lakes. Nothing contained in this part addresses the recreational use of waters of lakes.**

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**23-2-311. Right to portage – establishment of portage route. (1) A member of the public making recreational use of surface waters may, above the ordinary high-water mark, portage around barriers in the least intrusive manner possible, avoiding damage to the landowner's land and violation of his rights.**

(2) A landowner may create barriers across streams for purposes of land or water management or to establish land ownership as otherwise provided by law. If a landowner erects a structure which does not interfere with the public's use of the surface waters, the public may not go above the ordinary high-water mark to portage around the structure.

(3)(a) A portage route around or over a barrier may be established to avoid damage to the landowner's land and violation of his rights, as well as to provide a reasonable and safe route for the recreational user of the surface waters.

(b) A portage route may be established when either a landowner or a member of the recreating public submits a request to the supervisors that such a route be established.

(c) Within 45 days of the receipt of a request, the supervisors shall, in consultation with the landowner and a representative of the department, examine and investigate the barrier and the adjoining land to determine a reasonable and safe portage route.

(d) Within 45 days of the examination of the site, the supervisors shall make a written finding of the most appropriate portage route.

(e) The cost of establishing the portage route around artificial barriers must be borne by the involved landowner, except for the construction of notification signs of such route, which is the responsibility of the department. The cost of establishing a portage route around artificial barriers not owned by the landowner on whose land the portage route will be placed must be borne by the department.

(f) Once the route is established, the department has the exclusive responsibility thereafter to maintain the portage route at reasonable times agreeable to the landowner. The department shall post notices on the stream of the existence of the portage route and the public's obligation to use it as the exclusive means around a barrier.

(g) If either the landowner or recreationist disagrees with the route described in subsection (3)(e), he may petition the district court to name a three-member arbitration panel. The panel must consist of an affected landowner, a member of an affected recreational group, and a

member selected by the two other members of the arbitration panel. The arbitration panel may accept, reject, or modify the supervisors' finding under subsection (3)(d).

(h) The determination of the arbitration panel is binding upon the landowner and upon all parties that use the water for which the portage is provided. Costs of the arbitration panel, computed as for jurors' fees under *3-15-201*, shall be borne by the contesting party or parties; all other parties shall bear their own costs.

(i) The determination of the arbitration panel may be appealed within 30 days to the district court.

(j) Once a portage route is established, the public shall use the portage route as the exclusive means to portage around or over the barrier.

(4) Nothing contained in this part addresses the issue of natural barriers or portage around said barriers, and nothing contained in this part makes such portage lawful or unlawful.

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**23-2-312 through 23-2-320 reserved.**

**23-2-321. Restriction on liability of landowner and supervisor. (1) A person who makes recreational use of surface waters flowing over or through land in the possession or under the control of another, pursuant to *23-2-302*, or land while portaging around or over barriers or while portaging or using portage routes, pursuant to *23-2-311*, is owed no duty by a landowner, or his agent, or his tenant other than that provided in subsection (2).**

(2) A landowner, his agent, or tenant is liable to a person making recreational use of waters or land described in subsection (1) only for an act or omission that constitutes willful or wanton misconduct.

(3) No supervisor or any member of the arbitration panel who participates in a decision regarding the placement of a portage route is liable to any person who is injured or whose property is damaged because of placement or use of the portage route except for an act or omission that constitutes willful and wanton misconduct.

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**23-2-322. Prescriptive easement not acquired by recreational use of surface waters. (1) A prescriptive easement is a right to use the property of another that is acquired by open, exclusive, notorious, hostile, adverse, continuous, and uninterrupted use for a period of 5 years.**

(2) A prescriptive easement cannot be acquired through:

(a) recreational use of surface waters, including:

(i) the streambeds underlying them;

(ii) the banks up to the ordinary high-water mark; or

(iii) any portage over and around barriers; or

(b) the entering or crossing of private property to reach surface waters.

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Supreme Court, U.S.
FILED
APR 23 2003
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(2)

No. 02-1421

In The
# Supreme Court of the United States

HARVEY AND DORIS MADISON, CHARLES AND ELENA D'AUTREMONT, and HARRISON SAUNDERS,

*Petitioners,*

v.

PATRICK J. GRAHAM, Director, Montana Department of Fish, Wildlife & Parks; STAN MEYER, DAVID SIMPSON, CHARLES DECKER, DARLYNE DASCHER, and TIM MULLIGAN, Commissioners, Montana Fish, Wildlife and Parks Commission; MONTANA COALITION FOR STREAM ACCESS; MONTANA WILDLIFE FEDERATION; MONTANA CHAPTER OF TROUT UNLIMITED; and FISHING OUTFITTERS ASSOCIATION OF MONTANA,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF FOR THE RESPONDENTS, MONTANA COALITION FOR STREAM ACCESS; MONTANA WILDLIFE FEDERATION; MONTANA CHAPTER OF TROUT UNLIMITED; AND FISHING OUTFITTERS ASSOCIATION OF MONTANA, IN OPPOSITION

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## QUESTION PRESENTED

Whether the Landowners may pursue their claim based on a Fourteenth Amendment substantive due process theory where explicit textual protection is available under the Takings and Just Compensation Clauses of the Fifth Amendment.

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## OPINIONS BELOW

The Opinion of the Court of Appeals (Pet. App. 1-11) is reported at 316 F.3d 867 (9th Cir. 2002). The Opinion and Order of the United States District Court for the District of Montana (Pet. App. 12-27) is reported at 126 F.Supp.2d 1320 (D. Mont. 2001).

## JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATEMENT

Since before Montana's statehood in 1889, the lands of Montana's riparian landowners have been impressed with a public servitude allowing navigational and recreational use by the public. In *Gibson v. Kelly*, 15 Mont. 417, 423, 39 P. 517 (1895). The Court said:

> It is true that while the abutting owner owns to the low-water mark on navigable rivers, still the public have certain rights of navigation and fishery upon the rivers and upon the strip in question . . .

The issue of stream access in Montana was addressed in 1984 by the seminal companion cases, *Montana Coalition for Stream Access v. Curran*, 210 Mont. 38, 682 P.2d 163 (1984), and *Montana Coalition for Stream Access v. Hildreth*, 211 Mont. 29, 684 P.2d 1088 (1984). Relying on the public trust doctrine found in Article IX, § 3(3) of the Montana Constitution, the Court found that the state

owns the waters for the benefit of the people and held that the public's right to use the waters includes the right of use of the bed and banks up to the high-water mark. The holdings were broad. In *Curran*, the Court summarized its holding as follows:

> In sum, we hold that, under the public trust doctrine and the 1972 Montana Constitution, *any* surface waters that are capable of recreational use *may be so used by the public without regard to stream bed ownership or navigability* for non-recreational purposes.

210 Mont. at 53, 682 P.2d at 171 (emphasis added).[1]

In response to the *Coalition* decisions, the Montana Legislature passed HB 265 in 1985. HB 265 is now codified as § 23-2-301 *et seq.*, MCA.

The stream access legislation was the product of a compromise between recreationists and landowners. A judicial characterization of that process is found in Justice Hunt's dissenting opinion in *Galt v. State Dept. of Fish, Wildlife & Parks*, 225 Mont. 142, 731 P.2d 912 (1987) ("*Galt I*"), a constitutional challenge to HB 265 filed shortly after its enactment. Justice Hunt noted the goal of the subcommittee which generated HB 265 was to keep the legislation "... within the bounds of the Supreme

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[1] This holding was followed in *Adjudication of the Existing Rights to the Use of All the Water*, 2002 MT 216, 311 Mont. 327, 55 P.3d 396, ¶27 (Recognizing that public recreational use and fishing may make a stream navigable for "use" as opposed to title, and rejecting the old, narrow test of navigability). *Adjudication of the Existing Rights* was decided September 24, 2002, after the District Court's decision in this case but prior to the Circuit Court's decision.

Court decisions and to express the Legislature's desire to tie down and define the areas that were left very broad in those decisions." 225 Mont. at 153.

That legislation had the support of all of Montana's mainstream agricultural groups. The written testimony of the lobbyist for the Montana Stockgrowers Association is quoted at length by Justice Hunt in *Galt I*. The lobbyist noted that the *Coalition* decisions were ". . . broad, sweeping decisions which allowed the public the right to use all state waters for any recreational and incidental uses." *Id.* The lobbyist stated that:

> All groups agreed that it was critical to pass legislation this session, both to define areas left unclear by the Supreme Court of Montana's decisions, to allay the fears of landowners and recreationalists, and to avoid conflict as the newly won rights were tested and applied to specific streams other than the streams subject to the litigation.

*Id.* The lobbyist noted that, "while the results reached in those [*Coalition*] decisions were not to the liking of most landowners, it is irresponsible to ignore those decisions or to propose legislation which is not cognizant of the opinions of the Court." *Id.* at 155.

Even though the Montana Stream Access Law was the product of a unique alliance, and even though all of the responsible Montana agricultural groups supported it, it was challenged on constitutional grounds by Galt and others, including Harrison Saunders, who is a Plaintiff in

the present action.[2] The *Galt* plaintiffs were successful in setting aside several minor aspects of the Stream Access Law, but, in the main, the Montana Supreme Court upheld the statute. *Galt I*.

After *Galt I*, the law, as it applied to stream access, remained settled in Montana until 2000.

The present lawsuit was filed May 31, 2000, by three sets of Landowners, claiming that their Fourteenth Amendment rights to substantive due process of law are violated. This action was filed sixteen years after the *Coalition* decisions, fifteen years after the Stream Access Law was enacted, and thirteen years after the *Galt* decisions.

The Landowners claim that when they acquired their property they paid taxes on the property beneath the non-navigable stream on their land. This is not true. County Tax Assessors in Montana do not allocate real property taxes based on whether or not streams exist on property. Landowners' Statement of Facts also contains bald statements such as the Landowners have been "robbed" of their privacy, that their lands have been subjected to "commercial

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[2] The *Galt* plaintiffs based their complaint on state and federal constitutional issues. The *Galt* plaintiffs:

> [S]ought an order declaring HB 265, the "Stream Access Bill", § 23-2-301, *et seq.* MCA (1985), unconstitutional as a taking of private property without just compensation in violation of the *Fifth Amendment and Fourteenth Amendment to the United States Constitution* and Article II, § 29 of the Montana Constitution.

*Galt, et al. v. State Dept. of Fish, Wildlife & Parks* (*Galt II*), 230 Mont. 327, 328, 749 P.2d 1049 (1988) (emphasis added).

exploitation", and that the Stream Access Law has ". . . despoiled the pristine beauty of the land they love." Pet. for Cert., p. 4.

After hearing, the District Court dismissed the Landowners' Complaint with prejudice. The District Court first addressed the history of stream access in the state of Montana, addressing the 1972 Montana Constitution, which contains the following provision:

> All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

Article IX, § 3(3), E.R., p. 022. The Court then discussed the two seminal Montana cases, *Montana Coalition for Stream Access v. Curran*, *supra*, (the *Dearborn River Case*) and *Montana Coalition for Stream Access v. Hildreth*, *supra* (the *Beaverhead River Case*). The Court also discussed the enactment in 1985, "after much political compromise," of the Montana Stream Access Law §§ 23-2-301, *et seq.*, MCA. The Court then discussed *Galt I*, finding that, while certain minor provisions of the Stream Access Bill were found to be unconstitutional, the balance of the statutory scheme accords with the Constitution. The District Court found it significant that the plaintiffs in *Galt I* failed to appeal.

The District Court determined that the Landowners' first claim is properly viewed as a Fifth Amendment takings claim rather than a Fourteenth Amendment substantive due process claim. *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (*en banc*); *Macri v. King County*, 126 F.3d 1125 (9th Cir. 1997); *Sinclair Oil v. County of*

*Santa Barbara*, 96 F.3d 401 (9th Cir. 1996). 126 F.Supp.2d at 1324 (App. 18). The Court held that, even if construed as a "takings claim", the Supreme Court precedents of *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) do not support their argument. *Id.* at 1324-38 (App. 18-20).

The Circuit Court affirmed the decision of the District Court based on the Ninth Circuit's decision in *Armendariz*, holding that Landowners' claims alleging governmental interference with property must be brought under the Takings Clause of the Fifth Amendment, rather than the Due Process Clause of the Fourteenth Amendment. 316 F.3d at 870, App. 9. The Circuit Court also affirmed the District Court's rejection of the Landowners' void for vagueness claim on the basis that it was not adequately pled and that, in any event, there was nothing vague about the statute. *Id.* at 871 (App. 9, 10).

## ARGUMENT

### 1. THE NINTH CIRCUIT PROPERLY DECLINED TO APPLY SUBSTANTIVE DUE PROCESS ANALYSIS BECAUSE THE TAKINGS CLAUSE PROVIDES AN EXPLICIT TEXTUAL SOURCE OF CONSTITUTIONAL PROTECTION.

The Ninth Circuit determined in the Opinion below, after a close inspection of the Complaint, that the harms allegedly caused by the Montana Stream Access Law ". . . result from the Appellants' inability under the law to exclude others from their property." 316 F.3d at 869 (App. 5). In particular, the Ninth Circuit noted that the Plaintiff-Landowners' alleged right to exclude others from their

property represents ". . . one of the most essential sticks in the bundle of rights that are commonly characterized as property . . . ." citing *Loretto v. Teleprompter, Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982). The Circuit Court pointed out that Appellants recognize this well-established principle, citing the Complaint's language that, "[T]he power to exclude others is the hallmark of a private property interest, an essential component of private property rights." *Id.* (App. 6).

Thus, the Circuit Court found that the dispositive issue is whether the Landowners' claims must be analyzed under the Fifth Amendment's Takings Clause, ". . . or whether the analysis falls under the more generalized notions of substantive due process." *Id.*

The Ninth Circuit's opinion followed its previous opinion in *Armendariz* in holding that the Landowners' Complaint is governed by the more explicit constitutional provisions of the Takings Clause rather than the more generalized notion of substantive due process. *Armendariz*, in turn, was based on this Court's decision in *Graham v. Connor,* 490 U.S. 386 (1989).

The Ninth Circuit's decision is manifestly correct. First, it faithfully followed its precedents – not only *Armendariz*, but other Ninth Circuit precedents to the same effect. *See, e.g., Esplanade Properties, LLC v. City of Seattle,* 307 F.3d 978 (9th Cir. 2002) (affirming dismissal of federal substantive due process claim); *Macri v. King County,* 126 F.3d 1125, 1129 (9th Cir. 1997) (stating that Appellants cannot side-step *Armendariz* by re-characterizing their claim as lying solely in substantive due process).

These Ninth Circuit precedents, in turn, faithfully applied this Court's holding in *Graham v. Connor*, 490

U.S. 386, 395 (1989) ("Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.")

This Court, in *Albright v. Oliver,* 510 U.S. 266, 271 (1994), anchored the *Graham* principle in holding that an arrest without probable cause is more properly analyzed under the Fourth Amendment's "seizure" rubric and did not constitute a violation of the arrestee's substantive due process rights:

> We begin analysis of petitioner's claim by repeating our observation in *Collins v. Harker Heights,* 503 U.S. 115, 125 . . . (1992). "As a general matter, the Court has always been reluctant to expand the concept of substantive due process because the guideposts for responsible decision-making in this unchartered area are scarce and open-ended." The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity. *See, e.g., Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 847-849 . . . (1992) (describing cases in which substantive due process rights have been recognized). Petitioners' claim to be free from prosecution except on the basis of probable cause is markedly different from those recognized in this group of cases.

In short, the Ninth Circuit's refusal to allow Landowners to side-step the Takings Clause was manifestly correct.

## 2. THE DECISION OF THE NINTH CIRCUIT IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT.

The Landowners incorrectly argue that this Court has maintained a clear distinction between a substantive due process claim and a takings claim. Pet. for Cert., p. 7. To the contrary, language inserting principles of due process into takings jurisprudence is quite common. *See, e.g., Eastern Enterprises v. Apfel,* 524 U.S. 498, 537 (1998) (plurality Opinion) (O'Connor, J.) (concluding that "the governmental action [at issue in the case] implicates fundamental principles of fairness underlying the Takings Clause"); *Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980) (holding that zoning ordinance constitutes a taking if it does not "substantially advance a legitimate government interest").

Numerous Circuit Courts, in addition to the Ninth Circuit's decision in *Armendariz,* blur the distinction between takings and substantive due process, in the land-use context. *See, e.g., John Corp. v. City of Houston,* 214 F.3d 573, 584 (5th Cir. 2000), referring to the *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172 (1985) finality requirement in relation to the "'due process takings' claim described in that case"; *see also Villas of Lake Jackson v. Leon County,* 121 F.3d 610, 612 (11th Cir. 1997) (characterizing the main claim as a "due process takings" claim).

Landowners further argue that this Court's Opinion in *Apfel,* 524 U.S. 498, 537-38 (1998) (plurality Opinion) "preserved" a person's substantive due process claim regarding his property, even when he also asserted a takings claim. Pet. for Cert., p. 8. In fact, only Justice Kennedy's concurrence was based on substantive due process. The four

Justice plurality Opinion simply states that ". . . We need not address *Eastern's* due process claim . . . ." because they determined that the Act's allocation scheme violates the Takings Clause. 524 U.S. 538. Moreover, Justice Kennedy's concurrence finds the Takings Clause inapt because the Coal Act there challenged ". . . does not operate upon or alter an identified property interest, and is not applicable to or measured by a property interest." *Id.* at 540. Instead it ". . . imposes a staggering financial burden on the petitioner, Eastern Enterprises, but it regulates the former mine owner without regard to property." *Id.* Unlike *Apfel,* the present case involves a claim that the challenged Montana statute deprives the Landowners of a property right – a classic "takings" claim.

Landowners' reliance on *Collins v. City of Harker Heights,* 503 U.S. 115 and *County of Sacramento v. Lewis,* 523 U.S. 833, 845 (1998), Pet. for Cert., p. 8, is misplaced. Neither case involved land-use issues or classic regulatory takings issues. *Harker Heights* simply rejected a claim under 42 U.S.C. § 1983 that a city's failure to train or warn its employees about known hazards in the work place did not violate the Due Process Clause and that the Due Process Clause ". . . does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." Citing *Daniels v. Williams,* 474 U.S. 327, 332 (1986); 503 U.S. 115. Likewise, in *County of Sacramento,* the Court rejected a § 1983 claim against County Deputies, finding that an allegation of deliberate indifference to life in pursuing a high speed chase of a suspect was insufficient to state a substantive due process claim.

In *Harker Heights,* the Court observed:

> As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.

503 U.S. 125. The Court continued that the doctrine of judicial self-restraint requires the Court to exercise the utmost care whenever it is asked to break new ground in this field. *Id.*

In attempting to avoid this Court's holding in *Graham v. Connor,* 490 U.S. 386 (1989), Landowners cite *dicta* from *Soldal v. Cook County, Illinois,* 506 U.S. 56, 70 (1992). Pet. for Cert., p. 11. In *Soldal,* the plaintiffs' mobile home was removed and towed from a trailer park premises, under the observation of County Deputies, who were sued under § 1983. The Court of Appeals determined that, under *Graham v. Connor,* it should look at the "dominant character of the conduct challenged," and concluded that *Soldal's* claim was more akin to a challenge against the deprivation of property without due process of law than against an unreasonable seizure. . . ." *Id.* at 68. The Circuit Court concluded, therefore, that *Soldal* should not be allowed to bring his suit under the guise of the Fourth Amendment. In reversing, this Court held that the removal of the mobile home was a classic "seizure" implicating the Fourth Amendment. It cited *Graham* for the proposition that where several constitutional provisions target the same sort of governmental conduct, the Court will choose the more "explicit textual source of constitutional protection" over the "more generalized notion of 'substantive due process' ". 506 U.S. at 70. For that reason, this Court said: "Surely, *Graham* does not bar resort in this case to the

Fourth Amendment's specific protection . . . rather than the general protection of property in the Due Process Clause." *Id.*

In sum, the Petition for Certiorari cites no holding of this Court which is in conflict with the Ninth Circuit's application of *Armendariz* to this case.

### 3. ALTHOUGH SEVERAL CIRCUITS HAVE APPROACHED THE TAKINGS/SUBSTANTIVE DUE PROCESS ISSUE SOMEWHAT DIFFERENTLY FROM THE NINTH CIRCUIT, THERE IS NO DIRECT CONFLICT.

The Landowners argue that there is a significant "direct" conflict among the Circuits and that ". . . The Ninth Circuit stands alone," in its application of takings analysis to substantive due process claims. Pet. for Cert., pp. 11-15. First, the Ninth Circuit does not "stand alone" on this issue. Second, a careful reading of the cases cited reveals that, although there are some differences between the Ninth Circuit's approach and the approaches of several other Circuits, such differences are largely nuances in application in cases that are largely driven by their facts. *See, e.g., Miller v. Campbell County,* 945 F.2d 348, 353 n.6 (10th Cir. 1991) ("We need not address whether a taking might ever violate substantive or procedural due process without violating the Just Compensation Clause. We hold only that there is nothing in this record that would warrant a separate due process analysis over and above the consideration of the plaintiffs' more precise claims based on the Just Compensation Clause.").

The First Circuit, in *South County Sand & Gravel Co., Inc. v. Town of South Kingstown,* 160 F.3d 834 (1st Cir.

1998), considered an appeal of a challenge to a local ordinance regulating horizontal expansion of extractive industries. As a threshold question, the Court addressed whether the claim was properly classified as a substantive due process challenge or a takings claim. Referencing *Graham v. Connor, supra,* the Court stated:

> Because SCS's lament, at bottom, is a garden-variety regulatory takings claim, the Takings Clause, and not substantive due process, would seem to supply the proper decisional framework. (Citing *Villas of Lake Jackson, Ltd. v. Leon County,* 121 F.3d 610, 612-14 [11th Cir. 1997] and *Armendariz*).

*Id.* at 835. The Court, however, noted that in the context of that case, the differences were "largely a matter of semantics", *id.* at 836, and that there "is no need to submit to a tyranny of labels", concluding:

> Thus, although the substantive limits of the Takings Clause may not necessarily coincide with the substantive limits of the Due Process Clause in every imaginable context . . . the limits are congruent in this instance.

*Id.*

The primary differences between the Ninth Circuit's approach and that of other Circuits is found in the approach of the Fifth and Sixth Circuits. The Intervenors acknowledge that the Sixth Circuit, in *Pearson v. City of Grand Blanc,* 961 F.2d 1211, 1214 (6th Cir. 1992), did reject the rationale that all Federal zoning cases should be treated as "takings" on the basis that, "While it has the undoubted salutary advantage of minimizing the involvement of federal courts in local zoning[, it] cannot be

reconciled with current controlling precedent." The vitality of this holding is in doubt, however, based on the subsequent Sixth Circuit case *Montgomery v. Carter County, Tenn.*, 226 F.3d 758, 768-770 (6th Cir. 2000). *Montgomery* acknowledged, based on *Pearson*, that the Sixth Circuit's "precedents" permit (plaintiff) to assert "substantive due process . . . claims as well [as takings claims]." However, the Court went on to observe: "[I]t is not clear why the concept of substantive due process should have any place in takings cases." It then reviewed the analysis in *Armendariz* in a favorable way, but saw no need to resolve the issue, stating that:

> In any event, whatever the applicability of the concepts of procedural and substantive due process to takings claims, we agree that these concepts may not be used in order to mount an end run around the ripeness requirements of *Williamson County*.

The Landowners cite two Fifth Circuit cases, *Simi Inv. Co., Inc. v. Harris County, Texas*, 236 F.3d 240, 247 (5th Cir. 2000) and *John Corp. v. City of Houston*, 214 F.3d 573, 581 (5th Cir. 2000), for the proposition that, in the Fifth Circuit, the property owner's substantive due process claim is not subsumed by its Fifth Amendment takings claim. *Simi*, however, emphasized the limited nature of their holdings:

> Our limited holding in *John Corp.* is similarly limited here; we find only that when a state interferes with property interests, a substantive due process claim *may* survive a takings analysis and, therefore, provide jurisdiction for a federal court.

236 F.3d 249.

In *John,* the Court carefully reviewed the effect of *Graham* and noted that a number of Circuit Courts have used *Graham* "... to support considering a substantive due process claim as invoking the Takings Clause's protections (citing *South County Sand & Gravel Co., Inc. v. Town of South Kingstown,* 160 F.3d 834, 835 (1st Cir. 1998)) (applying *Graham* to facial due process challenge to ordinance); *Macri v. King County,* 126 F.3d 1125, 1129 (9th Cir. 1997) (holding that substantive due process claim alleging no legitimate public purpose was based on conduct that implicated the Takings Clause). 214 F.3d 582, 583. After examining these approaches, the *John* Court concluded that a "blanket rule" which applies *Graham* so that "the Takings Clause subsumes any substantive due process claim relating to a deprivation of property. . . ." is inconsistent with precedents in the Fifth Circuit and with the approach taken by a majority of other Circuits. 214 F.3d 583. "Instead, a careful analysis must be undertaken to assess the extent to which a plaintiff's substantive due process claim rests on protections that are also afforded by the Takings Clause, and, in the proper case, by the Fourth Amendment." *Id.* The Court then proceeded with a rather complicated and fact-driven analysis which, although different from the approach of the Ninth Circuit, is not in direct conflict.

Unlike *John,* the Landowners' theory in the present case falls squarely within the takings rubric because of the Landowners' allegation that they were deprived of the property right to exclude others. Thus, while there are differences between the Ninth Circuit and the Fifth Circuit in the application of *Graham v. Connor,* these differences are not material to the issues here presented by the Landowners.

The other Circuits cited by Landowners as "in conflict" – the Second, Third, Fourth and Eighth – are not.[3] In *Sameric Corp. v. City of Philadelphia,* 142 F.3d 582 (3rd Cir. 1998), there was no analysis of the Takings Clause at all – it was a straight substantive due process case. The Second Circuit's decision in *Kaluczky v. City of White Plains,* 57 F.3d 202 (2nd Cir. 1995) did not involve a land-use issue at all, or remotely implicate the Takings Clause. It involved a 1983 claim by a city personnel officer who alleged that the Mayor was of an adverse political party, and reduced his duties and harassed him in violation of the First and Fourteenth Amendments. In *Iowa Coal Min. Co. v. Monroe County, Iowa,* 257 F.3d 846, 853 (8th Cir. 2001), the Court simply addressed the substantive due process claim in connection with denial of a non-confirming use certificate, without addressing *Graham*.

Finally, Landowners cite two cases in which, they claim, the Courts held specifically that a person's property is protected by both the Due Process Clause and the Takings Clause, *Del-Rio Drilling Programs, Inc. v. United States,* 146 F.3d 1358 (Fed. Cir. 1998) and *Villas of Lake Jackson, Ltd. v. Leon County,* 121 F.3d 610 (11th Cir. 1997). Pet. for Cert., pp. 11-13. Although the Court in *Del-Rio* did determine that a party could seek just compensation for a "taking" or, in the alternative, seek to invalidate wrongful governmental conduct, *id.* at 1363, the Opinion does not use the term "substantive due process" at all in characterizing the potential claim.

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[3] Landowners acknowledge that the Seventh and Tenth Circuits are not in direct conflict. *See* Pet. for Cert., p. 15, n.1.

The Eleventh Circuit, in *Villas of Lake Jackson,* is even less useful in establishing a direct conflict. That case involved a suit against the County rezoning property to prohibit high-density apartment complexes. The Court's main analysis is under a rubric that it refers to as a "due process takings" claim. 121 F.3d at 612-614. Citing *Dolan v. City Tigard,* 512 U.S. 374, 384 n.5, the Court said, "There is no separate cause of action under the Due Process Clause of the Constitution."[4]

## CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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[4] The Court did, however, briefly address a separate substantive due process argument, which it referred to as "arbitrary and capricious due process", finding that the undisputed evidence included a finding that the rezoning was arbitrary and capricious. *Id.* at 614-615.

Supreme Court, U.S.
FILED
APR 25 2003

No. 02-1421

In The
# Supreme Court of the United States

HARVEY AND DORIS MADISON, CHARLES AND ELENA D'AUTREMONT and HARRISON SAUNDERS,

*Petitioners,*

v.

PATRICK J. GRAHAM, DIRECTOR, Montana Department of Fish, Wildlife, and Parks; STAN MEYER, DAVID SIMPSON, CHARLES DECKER, DARLYNE DASCHER, and TIM MULLIGAN, COMMISSIONERS, Montana Fish, Wildlife and Parks Commission, MONTANA COALITION FOR STREAM ACCESS; MONTANA WILDLIFE FEDERATION; and FISHING OUTFITTERS ASSOCIATION OF MONTANA,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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## ISSUE PRESENTED

Whether a party suffering an alleged permanent physical occupation of private property without just compensation may overcome procedural bars to the takings claim by refashioning their claim as an alleged arbitrary state interference with their private property protected by the substantive provisions of the Due Process Clause of the Fourteenth Amendment.

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## STATEMENT OF THE CASE

Petitioners, a group of private landowners in Montana, filed a Complaint on May 23, 2000, that challenged the constitutionality of the Montana Stream Access Law, Mont. Code Ann. § 23-2-301, *et seq*. Petitioners assert that the Stream Access Law violates the substantive due process clause of the Fourteenth Amendment of the United States Constitution in that it regulates private property for public use without being narrowly-tailored or rationally-related to any compelling or legitimate governmental purpose. In the alternative, Petitioners suggest that to enforce the Stream Access Law requires the Director of the Montana Department of Fish, Wildlife and Parks and the individuals serving on the Montana Fish Wildlife and Parks Commission, acting under the color of state law, to violate their private property rights in violation of 42 U.S.C. § 1983.

Respondents, the Director of the Montana Department of Fish, Wildlife and Parks and the individuals serving on the Montana Fish Wildlife and Parks Commission, filed a motion to dismiss the entire Complaint on August 3, 2000. Respondents-Intervenors, several local Montana sportsmen and wildlife groups, including the Montana Coalition for Stream Access, the Montana Chapter of Trout Unlimited, Fishing Outfitters Association of Montana, and the Montana Wildlife Federation, filed a separate motion on November 30, 2000, to dismiss the Petitioners' Complaint. The district court, the Honorable Charles C. Lovell presiding, issued its Opinion and Order on January 4, 2001, in which it granted in their entirety the motions to dismiss Petitioners' Complaint. 126 F. Supp. 2d 1320 (D. Mont. 2001); App. 12-27. Petitioners

filed a notice of appeal of the district court's Opinion and Order on February 5, 2001.

The Ninth Circuit affirmed the district court. 316 F.3d 867 (9th Cir. 2002) (App. 1-11). The Ninth Circuit determined that the harms alleged by Petitioners stemmed from the Petitioners' inability to exclude others from their property. (App. 5.) As a result, the Ninth Circuit addressed "whether a claim that a statute precludes private property owners from excluding others from their property must be analyzed under the Fifth Amendment's Takings Clause, or whether the analysis falls under the more generalized notions of substantive due process." (App. 6.) The Ninth Circuit reasoned that the right to exclude others represents a property right and, therefore, Petitioners have alleged harms addressed exclusively by the Fifth Amendment's Takings Clause. (App. 9.) The Takings Clause provides an explicit textual source of constitutional protection of private property, thus the Ninth Circuit concluded that "the Fifth Amendment (as incorporated by the Fourteenth), not the more generalized notion of substantive due process, must be the guide in reviewing the [Petitioners'] claim." (App. 9) quoting *Armendariz v. Penman*, 75 F.3d 1311, 1324 (9th Cir. 1996) (en banc).

## REASONS FOR DENYING THE WRIT

### I. THE NINTH CIRCUIT CORRECTLY DISMISSED PETITIONERS' SUBSTANTIVE DUE PROCESS CLAIM WHERE THE PETITIONERS ALLEGED INJURY TO PROPERTY RIGHTS SPECIFICALLY PROTECTED BY THE TAKINGS CLAUSE.

#### A. Montana's Stream Access Law Authorizes a Permanent Physical Occupation by the General Public of what Petitioners Allege to be Their Private Property and Their Challenge to the Law Must be Grounded in the Takings Clause.

The 1985 Montana Legislature enacted the Stream Access Law (Mont. Code Ann. §§ 23-2-301 to -322). In general terms, the Stream Access Law authorizes recreational use by the public of all navigable streams in Montana, up to the ordinary high-water mark, including the bed and banks, without regard to the ownership of the land underlying the waters. Mont. Code Ann. § 23-2-302. Unlike the federal navigation test that determines navigability based on the commercial use of the waterway, the Stream Access Law applies to all surface waters "that are capable of recreational use." *Id.* "Recreational use" includes "fishing, hunting, swimming, floating in small craft or other floatation devices, boating in motorized craft [or] craft propelled by oar or paddle." *Id.* at § 23-1-301(10).

The Stream Access Law came on the heels of two decisions by the Montana Supreme Court. First, in *Montana Coalition for Stream Access v. Curran*, 682 P.2d 163 (Mont. 1984), the court relied upon the Montana Constitution to determine that the public's right to use the waterways of Montana includes all recreational purposes within

the ordinary high-water marks. *Curran*, 682 P.2d at 167-70. The court found that those waterways in Montana imbued with the public trust included all those susceptible to public use. *Id.* at 169-70. This type of "[n]avagibility for use," according to the court, stands separate and apart from the federal question of determining "navigability for title purposes." *Id.* at 170. The court concluded, therefore, that "any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes." *Id.* at 171. Similarly, in *Montana Coalition for Stream Access v. Hildreth*, 684 P.2d 1088, 1091 (Mont. 1984), the court held that state law governs navigability for use and that under Montana's Constitution, "the only possible limitation of use can be the characteristics of the water themselves."

Thus, the Stream Access Law represents a codification of some portions of the decisions of the Montana Supreme Court in *Curran* and *Hildreth*. It creates a public thoroughfare, with limited exceptions, on all surface waters in Montana that are susceptible to recreational use. The public thoroughfare created by the Stream Access Law clearly authorizes a permanent physical occupation by the general public up to the ordinary high-water mark on these Montana waterways. The Stream Access Law raises the question, however, of whether it constitutes a taking of private property for public use without the payment of just compensation. No doubt exists that any taking effected by the Stream Access Law satisfies the public use requirement of the Fourteenth Amendment as it authorizes any member of the general public to use this statutorily-created thoroughfare. The only question remains as to

whether Montana should have been required to pay just compensation for this alleged taking of private property.

A group of riparian landowners, including Petitioner Harrison Saunders, sought to answer that question when they filed an action in which they alleged, among other matters, that the Stream Access Law constituted "a taking of private property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution." *Galt v. State Dept. of Fish, Wildlife & Parks*, 749 P.2d 1089, 1090 (Mont. 1988) (*Galt II*). The Montana Supreme Court upheld the Stream Access Law, with a few minor exceptions, to the broad constitutional challenge in *Galt v. State Dept. of Fish, Wildlife & Parks*, 731 P.2d 912 (Mont. 1987) (*Galt I*). The court in *Galt I* confirmed that property owners in Montana through whose property a water course flows "have their fee impressed with a dominant estate in favor of the public." *Galt I*, 731 P.2d at 916. The court concluded that the Stream Access Law had worked no taking of private property and as a result no compensation to any riparian landowners would be required. *Id.* at 916. The plaintiffs in *Galt I* did not seek review by this Court of the decision of the Montana Supreme Court. (App. 16.)

### B. Petitioners' Complaint Confirms That They Seek to Vindicate Their Right to Exclude Members of the Public From Their Property.

In 2000, nearly fifteen years after *Galt I*, Petitioners filed this action in federal district court. Rather than simply reasserting the takings claim advanced in *Galt I*, the Petitioners fashioned their claim as being grounded in alleged violations of the substantive due process provisions

of the Fourteenth Amendment. (Compl. ¶¶ 34-44; Respt. App. at 10-11.) The Petitioners' effort to seek relief under the general provisions of the substantive due process clause comes as no surprise when viewed in light of the Petitioners' failure to seek redress through any state administrative proceedings, state court proceedings, or other state tribunals, before filing this federal action. (App. 18.)

A review of Petitioners' complaint confirms that they seek to vindicate the right to exclude others from their property – a right clearly protected by the Takings Clause of the Fourteenth Amendment. For example, Petitioners allege that they "may not exclude others from their property nor prevent others from recreating on their property." (Compl. ¶ 24; Respt. App. 8.) *See Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (recognizing the right to exclude others as an essential element of *property*). This inability to exclude others from the surface waters flowing through their property has caused them to "suffer[] and continue to suffer a loss of privacy as a result of the Stream Access Law." (Compl. ¶ 22; Respt. App. 7.) Petitioners further allege that their inability to exclude others from the surface waters flowing through their property has caused them "to suffer impaired property values," particularly with respect to the recreational values of the property adjoining the waterways. (Compl. ¶ 23; Respt. App. 7-8.) *See, e.g., Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 684 (9th Cir. 1993) ("A regulatory taking occurs when the value or usefulness of private property is diminished by a regulatory action that does not involve a physical invasion of the property.").

Other attendant harms arising from Petitioners' inability to exclude the public from their property include

"frequent and repeated trespasses on their property," as well as "disturbance of livestock," "garbage," "harassment" and "urination and other acts of defecation." (Compl. ¶ 26; Respt. App. 8.)[1] As these facts indicate, Petitioners have alleged injuries – the right to exclude others and attendant harms – that sound in takings. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982) (recognizing the right to exclude others as "one of the most essential sticks in the bundle of rights that are commonly characterized as property"). The Takings Clause explicitly secures compensation to private parties in the event of a taking of private property by government of the kind alleged by Petitioners. *See First Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 315 (1987). The Montana legislature surely has the power to take private property for public use. *First Evangelical Lutheran Church*, 482 U.S. at 315. Through the Stream Access Law, the Montana legislature properly exercised its power to take private property for public use.

By contrast, this Court has found that the substantive provisions of the Due Process Clause of the Fourteenth Amendment are designed to protect individuals "against arbitrary action of government." Petr. Br. at 8, quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998). Nothing arbitrary results from the Montana legislature deciding to exercise its power to condemn private property

[1] Petitioners' Complaint fails to state whether these alleged attendant harms take place within the high-water marks of the public waterways flowing through their property. Any harms taking place above the high-water marks would constitute a trespass and would subject the transgressor to potential criminal prosecution under Montana law. *See* Mont. Code Ann. §§ 45-6-201, -203, and 87-1-204.

to create a public highway. In the same manner, nothing arbitrary results from the Montana legislature deciding to exercise its power to condemn private property to create a public thoroughfare on the surface of waterways in Montana up to the high-water mark.

Petitioners incorrectly rely on *Soldal v. Cook County*, 506 U.S. 56 (1992), to argue that the Court's decision in *Graham v. Connor*, 490 U.S. 386 (1989), does not foreclose their substantive due process claim. *Soldal* simply confirmed that the Fourth Amendment protects against all types of seizures of property by government officials, not just those that stem from searches conducted by government officials. Law enforcement officers, called at the request of a trailer park owner, assisted the owner in towing away a private party's mobile home for alleged nonpayment of rent. *Soldal*, 506 U.S. at 61.

The Seventh Circuit rejected the mobile home owner's claim grounded in the Fourth Amendment on the basis that *Graham* required it to look to the "dominant character of the conduct challenged" and, therefore, determined that *Soldal's* claim more closely resembled a challenge against an alleged "deprivation of property without due process of law than against an unreasonable seizure." *Id.* at 70. Accordingly, the Seventh Circuit concluded that the mobile home owner could not bring an action grounded in the Fourth Amendment. *Id.* This Court reversed, noting that the conduct at issue constituted a "classic seizure" of the type protected by the Fourth Amendment: "Surely, *Graham* does not bar resort in this case to the Fourth Amendment's specific protection for 'houses, papers, and effects' rather than the general protection of property in the Due Process Clause." *Id.* at 70-71.

In this case, the Takings Clause provides the specific constitutional protection for Petitioners' claim of the loss of the ability to exclude others from their property and attendant harms stemming from this inability to exclude others, rather than the more general provisions of the substantive component of the Due Process Clause. The Ninth Circuit properly dismissed Petitioners' substantive due process claim.

## II. THE NINTH CIRCUIT'S DECISION TO DISMISS PETITIONERS' SUBSTANTIVE DUE PROCESS CLAIM COMPORTS WITH THE DECISIONS OF OTHER CIRCUITS TO REQUIRE ACCURACY IN PLEADING.

Petitioners correctly note confusion among the circuit courts regarding the correct relationship between the protections afforded by the Takings Clause and those provided by the substantive component of the Due Process Clause. Petitioners fail to discuss, however, that the recent trend points to more uniformity in circuit courts in rejecting substantive due process claims that properly should have been pleaded as takings claims. And regardless of any split among the circuit courts, the Petitioners here have alleged a violation of the property right to exclude members of the public – a clear violation of the Takings Clause. The Court's resolution of the alleged split among the circuit courts would have no effect on the Petitioners' attempt to dress up its garden-variety takings claim as a substantive due process claim. The Court should await a better vehicle to address any split among the circuit courts regarding the proper relationship between takings claims and substantive due process claims.

### A. The Circuit Courts Have Permitted Substantive Due Process Claims Alleging Deprivations of Property Rights to Proceed Under Limited Circumstances Not Present Here.

Petitioners contend that "[s]even Circuits have recognized that a person's property is protected by both the Due Process Clause and the Takings Clause." (Petr. Br. at 13.) An analysis of decisions from the Fifth, Sixth, and First Circuits demonstrate, however, a prevailing trend away from analyzing such claims under the more generalized protections of the substantive component of the Due Process Clause and toward the more specific protections of the Takings Clause.

Petitioners point to decisions from the Fifth Circuit in *Simi Inv. Co., Inc. v. Harris County*, 236 F.3d 240, 247 (5th Cir. 2000), and *John Corp. v. City of Houston*, 214 F.3d 573, 581 (5th Cir. 2000). (Petr. Br. at 13.) In *John Corp.*, the Fifth Circuit rejected the blanket rule that, under *Graham*, the Takings Clause subsumes any substantive due process claim relating to deprivation of property, and ruled, instead that "a careful analysis must be undertaken to assess the extent to which a plaintiff's substantive due process claim rests on protections afforded by the Takings Clause." *John Corp.*, 214 F.3d at 583. The court in *Simi Inv. Co.*, relying largely on *John Corp.*, also refused to dismiss a substantive due process claim where the plaintiff alleged that Harris County arbitrarily interfered with its property rights, not that Harris County authorized any physical occupation of their property. *Simi Inv. Co.*, 236 F.3d at 247.

These decisions tell only part of the story in the Fifth Circuit. Petitioners fail to inform the Court that in its order denying en banc review, the court in *Simi Inv. Co.*,

addressed the concern raised by Harris County as to the scope of the substantive due process holding. The court recognized that "[i]n the majority of cases involving landowner complaints, substantive due process is not the appropriate avenue of relief." *Simi Inv. Co., Inc. v. Harris County*, 256 F.3d 323, 323 (5th Cir. 2001). In particular, the court stated that "artful pleading" of substantive due process claims cannot circumvent the court's Takings Clause jurisprudence. *Id.* And more recently, the court in *Sandy Creek Investors, Ltd. v. City of Jonestown*, 2003 U.S. App. LEXIS 5651 (5th Cir. Mar. 23, 2003), rejected an attempt to avoid Takings Clause analysis through such "artful pleading."

In *Sandy Creek*, the plaintiffs alleged that the City of Jonestown's actions in refusing to approve their land development permit despite the fact that the permit met all requirements of state and local law "were arbitrary, unreasonable, capricious, and lacking a substantial relation to any valid legislative/governmental objective." *Sandy Creek* at *4. The plaintiffs sought damages equal to the value of the property that they could not develop. *Id.* The court rejected this attempt to evade takings analysis and its exhaustion requirement. Although the Takings Clause does not necessarily subsume all substantive due process claims alleging deprivations of property, the court concluded that the plaintiffs' complaint that the City of Jonestown had violated the Fourteenth Amendment "was framed only as a takings claim" and, therefore, the plaintiffs' failure to exhaust state remedies deprived the federal court of jurisdiction over the claim. *Id.* at *7. *See also Kaluczky v. City of White Plains*, 57 F.3d 202, 211 (2d Cir. 1995) (relying on *Albright v. Oliver*, 510 U.S. 266 (1994), in dismissing substantive due process claim).

A similar narrowing took place in the Sixth Circuit. In *Pearson v. City of Grand Blanc,* 961 F.2d 1211, 1214 (6th Cir. 1992), the court rejected the notion that all federal constitutional challenges to unlawful zoning must be analyzed as potential takings claims. The court recognized that although such an approach "has the undoubted salutary advantage of minimizing the involvement of federal courts in local zoning, [it] cannot be reconciled with current controlling precedent." *Pearson*, 961 F.2d at 1214. A more recent decision in *Montgomery v. Carter County, Tenn.,* 226 F.3d 758, 768-70 (6th Cir. 2000), challenges this conclusion. The court in *Montgomery* acknowledged, based on *Pearson,* that the Sixth Circuit's "precedents" permit a party to assert a substantive due process claim along with the takings claim. The court questioned, however, "why the concept of substantive due process should have any place in takings cases." *Id.* at 770.

The trend continues in the First Circuit. In *South County Sand & Gravel, Inc. v. Town of South Kingstown*, 160 F.3d 834, 835 (1st Cir. 1998), the court alleged that a local ordinance limiting expansion of gravel pits violated their procedural and substantive due process rights. After reviewing the complaint, the court noted that "[b]ecause [plaintiffs'] lament, at bottom, is a garden-variety regulatory takings claim, the Takings Clause, not substantive due process, would seem to supply the proper decisional framework." *South County Sand & Gravel*, 160 F.3d at 835, citing *Villas of Lake Jackson, Ltd. v. Leon County*, 121 F.3d 610, 612-14 (11th Cir. 1997); *Armendariz v. Penman*, 75 F.3d 1311, 1325-26 (9th Cir. 1996) (en banc). Although the court recognized that the substantive limits of the Takings Clause may not always coincide with the substantive limits of the Due Process Clause in every conceivable

context, it explained that the "legal trend" had shifted away from allowing plaintiffs to assert generalized substantive due process violations. *Id.* at 835 n.2, citing *Albright*, 510 U.S. at 273; *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017-19 (1992) (concluding that a regulation that deprives land owner of economic value is a compensable taking). More recently in *Parella v. Retirement Board of the Rhode Island Employees' Retirement System*, 173 F.3d 58 (1st Cir. 1999), the First Circuit noted that "other recent decisions suggest that when faced with multiple, potentially relevant constitutional provisions, courts should invoke the provision that treats most directly the right asserted." *Id.* at 58, citing *Graham v. Connor*, 490 U.S. at 395; *Armendariz v. Penman*, 75 F.3d at 1324. The circuit courts' efforts to resolve any differences regarding their approaches to substantive due process/takings claims obviates the need for the Court to intervene at this point.

### B. The Court Should Await a Better Vehicle to Resolve Any Split Among the Circuit Courts Regarding the Relationship Between Substantive Due Process Claims and Takings Claims.

Even if the Court determines that a split exists among the circuit courts regarding the proper relationship between a takings claim and a substantive due process claim, the Court should wait for a better vehicle to resolve any split. No doubt exists that Petitioners' object to the Stream Access Law due to the constraints that it imposes on their ability to exclude the public from portions of their property. (Compl. ¶¶ 24, 39, 53; App. 8, 11, 13.) The ability to exclude others represents "the hallmark of a private

property interest." *Id.* at 13. *See also Kaiser Aetna v. United States*, 444 U.S. at 176 (recognizing the right to exclude others as an essential element of *property*). Although the Stream Access Law permits the public to use portions of their property, Petitioners allege that it was enacted for an improper purpose and thereby violates their substantive due process rights. (Apps. 11, 13.)

In *Forseth v. Village of Sussex*, 199 F.3d 363 (7th Cir. 2000), the court noted that physical occupations undertaken for an improper purpose, such as wholly private uses, should be reviewed pursuant to a takings analysis rather than under a substantive due process analysis. *Id.* at 369 n.8 (citations omitted). Takings analysis, of course, requires a party to exhaust its available state remedies. *Williamson County Reg. Planning Commn. v. Hamilton Bank*, 473 U.S. 172, 193-94 (1985). Many courts have imposed the same exhaustion of available state remedies requirement in order to sustain a substantive due process claim. *See, e.g., Signature Properties Intern., Ltd. Partnership v. City of Edmond*, 310 F.3d 1258, 1267-68 (10th Cir. 2002) (refusing to excuse exhaustion requirement for alleged substantive due process violation). Petitioners have not availed themselves of any potential state remedies. This failure to exhaust potential state remedies imposes insuperable barriers to Petitioners' claim regardless whether it be viewed as a takings claim or a substantive due process claim. The Court should wait for a case in which resolution of the substantive due process/takings analysis would alter the outcome of the underlying claim.

## CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MONTANA**

| | |
|---|---|
| HARVEY AND DORIS MADISON, CHARLES AND ELENA D'AUTREMONT, AND HARRISON SAUNDERS,<br><br>Plaintiffs,<br><br>v.<br><br>MONTANA DEPARTMENT OF FISH, WILDLIFE & PARKS; PATRICK J. GRAHAM, DIRECTOR, MONTANA DEPARTMENT OF FISH, WILDLIFE & PARKS; MONTANA FISH, WILDLIFE & PARKS COMMISSION; AND STAN MYER, DAVID SIMPSON, CHARLES DECKER, DARLYNE DASCHER, AND TIM MULLIGAN, COMMISSIONERS,<br><br>Defendants. | Civil Action No. CV-00-18-H-CCL<br><br>**COMPLAINT**<br><br>(Filed May 31, 2000) |

## INTRODUCTION

Plaintiffs, by and through their attorney, Mountain States Legal Foundation, file this Complaint against Defendants, Montana Department of Fish, Wildlife & Parks; Patrick J. Graham, Director, Montana Department of Fish, Wildlife & Parks, in his individual and official capacity; Montana Fish, Wildlife & Parks Commission; and Stan Meyer, David Simpson, Charles Decker, Darlyne Dascher, and Tim Mulligan, Commissioners, in their individual and official capacities, and allege the following:

## JURISDICTION AND VENUE

1. The jurisdiction of this Court is invoked, pursuant to 28 U.S.C. § 1331, because the matter in controversy arises under the Constitution and/or laws of the United States.

2. Venue rests properly in this Court, pursuant to 28 U.S.C. §§ 1391(b), because Defendants reside in this judicial district.

## PARTIES

3. Plaintiffs Harvey and Doris Madison are residents of Absarokee, Montana. In 1905, a one thousand-acre ranch on the Stillwater River in Stillwater County, Montana, was homesteaded by Mr. Madison's grandfather, Mathew Madison. Since 1978, the Madisons have owned the ranch pursuant to inheritance of the Desert Lands homestead patent issued by the United States to Mathew Madison in 1905. Their property encloses approximately one mile of the Stillwater River, which is not, and historically has never been, commercially navigable.

4. Plaintiffs Charles and Elena d'Autremont maintain a residence in Alder, Montana. Since 1978, the d'Autremonts have owned a 275-acre ranch on the Upper Ruby River in Madison County, Montana. Their property encloses approximately one and one half miles of the Ruby River, which is not, and historically has never been, commercially navigable.

5. Plaintiff Harrison Saunders is a resident of Ennis, Montana. Since 1876, a ranch of approximately 100 acres on O'Dell Creek in Madison County, Montana, has been owned and controlled by the Saunders family. Since the 1950s, Mr. Saunders has owned an interest in the ranch, and today he retains a life estate in the property, with the remainder deeded to his son and daughters. His property encloses approximately three-quarters of a mile of O'Dell Creek, which is not, and historically has never been, commercially navigable.

6. Defendants Montana Department of Fish, Wildlife & Parks is the state agency responsible for management of fish, wildlife, parks, and recreational resources. Defendant Patrick J. Graham is the Director of the Montana Department of Fish, Wildlife & Parks and is the official primarily responsible for the Department's fulfillment of its obligations. Defendants Stan Meyer, David Simpson, Charlie Decker, Darlyne Dascher, and Tim Mulligan form the Defendant Montana Fish, Wildlife & Parks Commission. The Commission sets fish and wildlife regulations, approves property acquisitions, and approves rules and activities of the Department as provided by Montana statute.

FACTUAL BACKGROUND

7. Montana Code Annotated, Section 70-1-202, provides:

> The state is the owner of:
>
> (1) all land below the water of a navigable lake or stream;
>
> (2) all property lawfully appropriated by it to its own use . . .

8. Montana Code Annotated, Section 70-16-201, provides:

> Except where the grant under which the land is held indicates a different intent, the owner of the land, when it borders upon a navigable lake or stream, takes to the edge of the lake or stream at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream.

9. The streambed and banks underlying the portion of the Stillwater River flowing through Plaintiff Madisons' property are privately owned by the Madisons, because that portion of the Stillwater is not, and has never been, commercially navigable. The Madisons own title to and pay taxes on the streambed and banks underlying the Stillwater River on their property.

10. The Stillwater River flows within approximately 300 yards of the Madison's home and within approximately 50 feet of a barn on their property. The Madisons keep cattle and horses on their property near the river banks.

11. The streambed and banks underlying the portion of the Ruby River flowing through Plaintiff d'Autremonts' property are privately owned by the d'Autremonts, because that portion of the Ruby River is not, and has never been, commercially navigable. The d'Autremonts own title to and pay taxes on the streambed and banks underlying the Ruby River on their property.

12. The Ruby River flows within 150 feet of the front door of the d'Autremont's dwelling on their property.

13. The d'Autremonts purchased their Montana property after a two-year search that took as far as British Columbia and Alberta, Canada. After a number of years in the whitewater outfitting business in Wyoming and Utah, they were specifically looking for a remote and private place to raise a family.

14. After purchasing their Montana property, the d'Autremonts ejected a steady stream of trespassers for several years and saw a corresponding improvement in the fishing on their property. All of their neighbors followed the same practice, under the belief that since they held title to and paid taxes on the land under the stream, they were entitled to choose who stood on it.

15. The streambed and banks underlying the portion of O'Dell Creek flowing through Plaintiff Saunders property are privately owned by Mr. Saunders, because that portion of O'Dell Creek is not, and has never been, commercially navigable. Mr. Saunders owns title to and pays taxes on the streambed and banks underlying O'Dell Creek on his property.

16. O'Dell Creek flows within approximately one-quarter mile of Mr. Saunders' home on his property. Mr.

Saunders has used rip-rap on the stream banks to protect the stream against erosion and has restricted grazing to horses only for over 30 years in order to protect the stream bank and encourage a more productive fish habitat.

17. The Montana Stream Access Law, judicially created in 1984 and subsequently codified in 1985, provides that all surface waters in the state capable of recreational use may be so used by the public without regard to the ownership of the land underlying the waters. The Law allows recreational use up to the ordinary high-water mark of rivers and streams. The public is also given the right to "portage" around barriers or obstructions in the water when necessary by going above the high-water mark onto the landowner's property. Recreational uses that are permitted include fishing, hunting, swimming, camping, floating, use of motorized watercraft, building fires below the high-water mark, and "related unavoidable or incidental uses." Mont. Code Ann. §§ 23-2-301, *et seq.*

18. Montana Code Annotated, Section 23-2-301(12), provides:

> "Surface water" means, for the purpose of determining the public's access for recreational use, a natural water body, its bed, and its banks up to the ordinary high-water mark.

19. Montana Code Annotated, Section 23-2-302(1), provides:

> [A]ll surface waters that are capable of recreational use may be so used by the public without regard to the ownership of the land underlying the waters.

20. Montana Code Annotated, Section 23-2-308, provides:

> The provisions of this part and the recreational uses permitted by 23-2-302 do not affect the title or ownership of the surface waters, the beds, and the banks of any navigable or nonnavigable waters or the portage routes within this state.

21. Montana Code Annotated, Section 23-2-311(1), provides:

> A member of the public making recreational use of surface waters may, above the ordinary high-water mark, portage around barriers in the least intrusive manner possible, avoiding damage to the landowner's land and violation of his rights.

Section 23-2-311(4) provides that such portage around natural barriers, such as waterfalls, rocks, and fallen trees, is neither "lawful [n]or unlawful."

22. Plaintiffs have suffered and continue to suffer loss of privacy as a result of the Stream Access Law. They have lost the right to privacy as guaranteed by Article II, Section 10 of the Montana Constitution. Since the passage of the Montana Stream Access Law, the d'Autremonts have lost the very privacy for which they purchased their property, and all plaintiffs have lost the privacy that they have treasured on their land for decades.

23. Plaintiffs have suffered and continue to suffer from impaired property values as a result of the Stream Access Law. Seven years before passage of the Stream Access Law, the d'Autremonts paid a substantial recreational, not agricultural, price for their property. As a result of the Stream Access Law, the recreational value of

the property is impaired. For more than 25 years, prior to the passage of the Stream Access Law, Mr. Saunders and his family leased the right to use the stream and the streambed on his property for $4000 up to $11,500 per year. As a result of the Stream Access Law, Mr. Saunders is no longer able to earn this substantial amount toward his retirement from use of his property by others.

24. Plaintiffs may not exclude others from their property nor prevent others from recreating on their property near their home, buildings, and livestock as a result of the Stream Access Law.

25. Plaintiffs have lost the inalienable right to acquire, possess, and protect property as guaranteed by Article II, Section 3 of the Montana Constitution as a result of the Stream Access Law.

26. Plaintiffs have been and continue to be subject to frequent and repeated trespasses on their properties, which the State is unable to stop or to prevent due to the remote nature of the properties. Plaintiffs have also suffered and continue to suffer, among other harms, disturbance of livestock, garbage left on the property, harassment or interference with Plaintiffs' attempts to use their own property, and urination and other acts of defecation on the property as a result of the public access permitted by the Stream Access Law. In addition, stream users build campfires and prepare meals, subjecting Plaintiff's private property to the risk of forest and grass fires.

27. The boundaries of public access are not clearly defined. The "high-water mark" can be difficult to ascertain, leaving Plaintiffs, the recreating public, and even the Department of Fish, Wildlife & Parks, uncertain of this mark and the precise limits of public access.

28. The Stream Access Law also explicitly fails to define the legality of portage around natural barriers in a stream, creating much uncertainty not only for Plaintiffs and other property owners subject to the Stream Access Law, but for all involved in use and enforcement of the Law.

29. Outfitting businesses target high-quality properties and build their businesses on use of Plaintiffs' properties as a result of the Stream Access Law. The d'Autremonts' property has been and continues to be the subject of advertisement and profit for a neighboring outfitter. Outfitting businesses and others regularly benefit financially from use of the Madisons' and Mr. Saunders' properties.

30. In 1987, the Montana Supreme Court upheld the Stream Access Law, asserting the public trust doctrine, against a property owner's challenge. *See Galt v. State Dept. of Fish, Wildlife & Parks*, 731 P.2d 912 (1987). With the exception of a few auxiliary provisions, the Law was upheld as conforming to the requirements of the Montana Constitution. The public trust doctrine was asserted by the Montana Supreme Court as the original basis for public stream access in *Montana Coalition For Stream Access v. Curran*, 682 P.2d 163 (Mont. 1984), and *Montana Coalition For Stream Access v. Hildreth*, 684 P.2d 1088 (Mont. 1984).

31. The "public trust" provision of the Montana Constitution, Article IX, Section 3(3), provides:

> All surface, underground, flood and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and

> subject to appropriation for beneficial uses as provided by law.

FIRST CLAIM FOR RELIEF

32. Plaintiffs reallage Paragraphs 1 through 31.

33. The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

34. The Due Process Clause of the Fourteenth Amendment contains a substantive component that protects individual liberty against certain government actions, regardless of the fairness of the procedures used to implement them.

35. The Due Process Clause provides heightened protection against governmental interference with fundamental rights and liberty interests.

36. Where a state law infringes upon a fundamental right, that state law must be narrowly tailored to serve a compelling state interest in order to comport with substantive due process.

37. Where a state law infringes upon a non-fundamental right, that state law must substantially advance a legitimate state interest in order to comport with substantive due process.

38. The right to own and use private property is a fundamental right and liberty, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty.

39. The power to exclude others is the hallmark of a private property interest, an essential component of private property rights.

40. There is no public trust in private property. The public trust doctrine does not extend, and has not historically extended, to recreational use of historically non-navigable waters. Thus, the Montana Stream Access Law was enacted for purposes completely unrelated to the public trust doctrine and its purposes.

41. There is neither a compelling nor a legitimate state interest in regulating private property for public use under the public trust doctrine.

42. The Montana Stream Access Law is not narrowly tailored to any compelling or legitimate state interest in regulating private property for public use under the public trust doctrine.

43. The Montana Stream Access Law does not substantially advance a legitimate state interest in regulating private property for public use under the public trust doctrine.

44. The Montana Stream Access Law constitutes a violation of the substantive due process guaranteed by the Fourteen Amendment to the United States Constitution.

ALTERNATIVE FIRST CLAIM FOR RELIEF

45. Plaintiffs reallege paragraphs 1 through 31.

46. Title 42, Section 1983 of the United States Code provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

47. The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

48. The Due Process Clause of the Fourteenth Amendment contains a substantive component that protects individual liberty against certain government actions, regardless of the fairness of the procedures used to implement them.

49. The Due Process Clause provides heightened protection against governmental interference with fundamental rights and liberty interests.

50. Where a state law infringes upon a fundamental right, that state law must be narrowly tailored to serve a compelling state interest in order to comport with substantive due process.

51. Where a state law infringes upon a non-fundamental right, that state law must substantially advance a legitimate state interest in order to comport with substantive due process.

52. The right to own and use private property is a fundamental right and liberty, deeply rooted in this

Nation's history and tradition and implicit in the concept of ordered liberty.

53. The power to exclude others is the hallmark of a private property interest, an essential component of private property rights.

54. There is no public trust in private property. The public trust doctrine does not extend, and has not historically extended, to recreational use of historically non-navigable waters. Thus, the Montana Stream Access Law was enacted for purposes completely unrelated to the public trust doctrine and its purposes.

55. There is neither a compelling nor a legitimate state interest in regulating private property for public use under the public trust doctrine.

56. The Montana Stream Access Law is not narrowly tailored to any compelling or legitimate state interest in regulating private property for public use under the public trust doctrine.

57. The Montana Stream Access Law does not substantially advance a legitimate state interest in regulating private property for public use under the public trust doctrine.

58. The Montana Stream Access Law constitutes a violation of the substantive due process guaranteed by the Fourteen Amendment to the United States Constitution.

59. Under color of the Montana Stream Access Law, Defendants Patrick J. Graham, Stan Meyer, Davis Simpson, Charles Decker, Darlyne Dascher, and Tim Mulligan have subjected Plaintiffs or caused Plaintiffs to be subjected to the deprivation of rights, privileges, or immunities

secured by the Constitution and laws of the United States, and these Defendants continue to subject Plaintiffs to such deprivation, and these Defendants are liable therefore.

SECOND CLAIM FOR RELIEF

60. Plaintiffs reallage paragraphs 1 through 59.

61. Adequate notice of what conduct is permitted and what conduct is proscribed is a component of a statute's conformity with due process.

62. The Montana Stream Access Law fails to provide adequate notice as to what conduct is permitted and what conduct is proscribed with regard to portage around natural barriers in a stream and with regard to streams in which the high water mark is not readily ascertainable.

63. The Stream Access Law is unconstitutionally vague and void for vagueness.

WHEREFORE, Plaintiffs respectfully request that this Court:

(1) Declare and adjudge the Montana Stream Access Law to be in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

(2) Enjoin Defendants permanently from enforcing the Montana Stream Access Law with regard to privately owned streambeds and banks underlying historically non-navigable waters in the State of Montana.

(3) Award Plaintiffs costs and attorneys' fees.

(4) Award Plaintiffs such further relief as is just and equitable.

DATED this 26th day of May, 2000.

Respectfully submitted,

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No. 02-1421

# In The Supreme Court of the United States

HARVEY AND DORIS MADISON,
CHARLES AND ELENA D'AUTREMONT,
and HARRISON SAUNDERS,

*Petitioners,*

v.

PATRICK J. GRAHAM, Director, Montana Department of Fish, Wildlife, and Parks; STAN MEYER, DAVID SIMPSON, CHARLES DECKER, DARLYNE DASCHER, and TIM MULLIGAN, Commissioners, Montana Fish, Wildlife and Parks Commission; MONTANA COALITION FOR STREAM ACCESS; MONTANA WILDLIFE FEDERATION; MONTANA CHAPTER OF TROUT UNLIMITED; and FISHING OUTFITTERS ASSOCIATION OF MONTANA,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## REPLY BRIEF OF PETITIONERS

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## REPLY BRIEF OF PETITIONERS

## I. RESPONDENTS' CHARACTERIZATION OF THE BACKGROUND PRINCIPLES OF LAW IS INACCURATE.

### A. The Montana Supreme Court Addressed Only State Law In The *Galt* Decision.

Montana's passage of the Stream Access Law was a reaction to the Montana Supreme Court's decisions in *Montana Coalition for Stream Access v. Curran*, 682 P.2d 163 (Mont. 1984) and *Montana Coalition for Stream Access v. Hildreth*, 684 P.2d 1088 (Mont. 1984); that is, it was an attempt by the Montana Legislature to make the "public trust doctrine" of the Montana Constitution applicable to the private property beneath and adjacent to non-navigable waters.

In *Galt v. Montana Dept. of Fish, Wildlife & Parks*, 731 P.2d 912, 916 (Mont. 1987), the Montana Supreme Court held that, with the exception of a few minor provisions, the Montana Stream Access Law "accords with the Montana Constitution and the opinions of this Court."[1] In that holding, the Montana Supreme Court discussed only state law, ignoring the plethora of opinions of this Court and the opinions of the federal circuits regarding the Fifth and Fourteenth Amendment protections afforded private property. Moreover, although the landowners asserted

[1] The State now admits that the Stream Access Law "clearly authorizes a permanent physical occupation by the general public" of Montana Landowners' private property and that "[t]hrough the Stream Access law," the Montana Legislature "exercised its power to take" and "condemn[ed]" private property for public use. State's Response, at 3, 7-8.

federal constitutional claims, the Montana Supreme Court declined to address them.[2]

### B. The "Public Trust Doctrine" Does Not Extend To Private Property Underlying And Riparian To Non-navigable Streams.

Under federal law, the "public trust doctrine" does not extend to public use of private property underlying state-owned waters. The public trust doctrine provides only that the navigable waters of a state and the land beneath those waters, that is, "property in which the public has an interest," are "held in trust for the people of the state."[3] *Illinois Central R. Co. v. State of Illinois*, 146 U.S. 387, 452 (1892). However, the public trust doctrine does not apply to "land riparian to *nonnavigable* streams;" in fact, the use of "the adjacent riverbed" is reserved to the "owners" thereof as a result of the conveyance of land by the United States and is not a part of the public trust. *Montana v. United States*, 450 U.S. 544, 551 (1981) (emphasis in original).[4]

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[2] *Galt, et al. v. Montana Dept. of Fish, Wildlife & Parks*, 749 P.2d 1089, 1090 (Mont. 1988) ("*Galt II*") makes clear that the landowners in *Galt I* had alleged federal constitutional violations.

[3] The historic test for navigability, which defines those waters over which a state has control, is navigability-in-fact or navigability for the purposes of commerce. *Illinois Central*, 146 U.S. at 436 (holding that the public trust doctrine is "founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment").

[4] Although the Desert Lands Act specifically reserved to the states even non-navigable "water of all lakes, rivers, and other sources of water supply," to be held in the public trust, the purpose of that reservation was to ensure that the waters would remain "free for the appropriation and use of the public for irrigation, mining and manufacturing purposes."

(Continued on following page)

Accordingly, prior to the enactment of the Montana Stream Access Law, Montana law recognized that the State has no interest in the lands beneath and adjacent to non-navigable streams. "The owner of the land, when it borders upon a navigable lake or stream, takes to the edge of the lake or stream at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream." Mont. Code Ann. § 70-16-201. Similarly, Mont. Code Ann. § 70-1-202 provides, "The state is the owner of . . . all land below the water of a navigable lake or stream." In fact, even with regard to navigable streams, Montana set its own boundary at the low-water mark, that is, Montana claims only the land consistently beneath navigable water. Mont. Code Ann. § 70-16-201. It is this "strip of land between the high-water and the low-water mark" on navigable rivers to which the Montana Supreme Court referred as part of the public trust in *Gibson v. Kelly*, 39 P. 517, 519 (Mont. 1895). The public "rights of navigation and fishery" referenced in that case accordingly applied only to navigable waters.

"Although the States may commit public trust waterways to uses other than transportation, such as fishing or land reclamation, this exercise of sovereign discretion does not enlarge the scope of the public trust." *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 488 (1988) (Justice O'Connor, with whom Justices Stevens and Scalia joined, dissenting). Accordingly, "[e]ven the majority does not claim that the public trust extends to every waterway that can be used for fishing or for land reclamation." *Id.* "Only

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*California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158 (1935).

waterways that are part of a [historically] navigable body of water belong to the public trust." *Id.* at 491.[5]

## II. THE DECISION BY THE NINTH CIRCUIT IS IN CONFLICT WITH DECISIONS OF THIS COURT, INCLUDING ITS LATEST ON THE PROTECTION AFFORDED PROPERTY BY THE DUE PROCESS CLAUSE.

In the Petition for *Writ of Certiorari*, Montana Landowners demonstrated that the decision of the Ninth Circuit is in conflict with decisions of this Court regarding the constitutional protection afforded a person's property by the Due Process Clause. Petition, at 7-11. Montana Landowners' position was reaffirmed when, the day after the Petition was filed in this case, this Court ruled in *City of Cuyahoga Falls, Ohio v. Buckeye Comm. Hope Found.*, ___ U.S. ___, 123 S.Ct. 1389 (March 25, 2003). In that opinion, Justice O'Connor, joined by six Justices, addressed the merits of the plaintiffs' Due Process Clause claim by assuming that plaintiffs had been denied a property interest. *Id.* at 1396. Thus, this Court reaffirmed its long held view, a view rejected by the Ninth Circuit, that a person's property is protected by Due Process Clause.

This Court should grant the Petition to resolve this conflict.

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[5] See, *Utah Div. of State Lands v. United States*, 482 U.S. 193, 197-98 (1987); *Montana v. United States*, 450 U.S. 544, 551 (1981); *Utah v. United States*, 403 U.S. 9, 10 (1971); *United States v. Oregon*, 295 U.S. 1, 14 (1935); *Oklahoma v. Texas*, 258 U.S. 574, 583 (1922).

## III. RESOLUTION OF THE UNDISPUTED SPLIT IN THE CIRCUITS WOULD AFFECT MONTANA LANDOWNERS' CLAIMS.

The State admits that there is "confusion" in the Circuits regarding the relationship between the protections afforded private property under the Takings Clause of the Fifth Amendment and under the Due Process Clause of the Fourteenth Amendment. State's Response, at 9. Intervenors admit that there are "differences" between the Ninth Circuit's approach and the approach of other Circuits on this issue. Intervenors' Response, at 12. Furthermore, Intervenors acknowledge that "[n]umerous" Circuits "blur the distinction between takings and substantive due process" in the context of governmental interference with private property. Intervenors' Response, at 9. Nonetheless, the State and Intervenors assert erroneously that resolution of this "confusion" and these "differences" would not affect Montana Landowners' claims.

### A. Exhaustion Requirements Are Not Applicable Because Montana Landowners Seek Injunctive Relief And Not Damages.

Montana argues that Montana Landowners' "failure to exhaust potential state remedies" imposes a barrier to Montana Landowners' claims such that a resolution by this Court of the conflicts set forth in the Petition would not "alter the outcome of the underlying claim." State's Response, at 14. To the contrary, the exhaustion requirements of *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985), are inapplicable to Due Process Clause claims.

The Fifth Amendment "proscribes taking without just compensation." *Williamson County*, 473 U.S. at 194.

Therefore, "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Williamson County*, 473 U.S. at 195. However, because Montana Landowners seek injunctive relief, and not just compensation, there are no "potential State remedies" for them to "exhaust." *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1407 (9th Cir. 1989) (*rev'd on other grounds*).[6] Just compensation would not remedy their injuries; rather, they seek to invalidate the wrongful governmental action. *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1363 (Fed. Cir. 1998).

For this reason, some Circuits, including the Ninth Circuit, have recognized that exhaustion requirements do not apply to Due Process Clause claims. "[T]he second ripeness prong of *Williamson County* (requiring exhaustion of state procedures for obtaining compensation)" is "inapplicable to [substantive due process] claims." *Sinaloa Lake*, 882 F.2d at 1407. The Seventh Circuit, relying on *Williamson County*, held that exhaustion of state inverse condemnation procedures was not a prerequisite to assertion of a Due Process Clause claim because the state remedies would not address "plaintiffs' right to have the zoning ordinance invalidated." *Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield*, 907 F.2d 239, 242 n. 3

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[6] Although the Ninth Circuit has overruled *Sinaloa* "to the extent that *Sinaloa* stands for the proposition that a plaintiff may bring a substantive due process claim whenever his other claims are unsuccessful," *Armendariz v. Penman*, 75 F.3d 1311, 1326 (9th Cir. 1996), the *Sinaloa* holding, that exhaustion of state remedies is unnecessary when the plaintiff asserts that the government's action is void *ab initio*, remains.

(1st Cir. 1990); *see also*, *Rutherford v. City of Berkeley*, 780 F.2d 1444, 1447 (9th Cir. 1986) ("the existence of postdeprivation state remedies does not bar a substantive due process claim under [42 U.S.C.] Sec. 1983"); *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1574 n. 8 (11th Cir. 1989) (holding second prong of *Williamson County* ripeness test not applicable in substantive due process context).

Moreover, in *Montgomery v. Carter County, Tenn.*, 226 F.3d 758, 766-767 (6th Cir. 2000), upon which Intervenors rely, Intervenors' Response, at 14, the Sixth Circuit acknowledged that a claim alleging that the governmental interference is unconstitutional "regardless of whether just compensation is paid," that is, a claim not seeking just compensation as a remedy, is not subject to exhaustion requirements and is ripe for review. Rather, exhaustion requirements apply only to the extent that the plaintiff is seeking compensation or damages. *Id.* at 767, 769-770.[7] Similarly, in *Signature Properties Intern., Ltd. Partnership v. City of Edmond*, 310 F.3d 1258, 1260 (10th Cir. 2002), and *Sandy Creek Investors, Ltd. v. City of Jonestown*, ___ F.3d ___, 2003 WL 1469455 (5th Cir. March 24, 2003), upon which the State relies, State's Response, at 14, the plaintiffs also sought just compensation or damages, while Montana Landowners seek only injunctive relief.[8]

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[7] Although the Sixth Circuit held that the plaintiff's substantive due process claim was subject to the *Williamson County* exhaustion requirements, *Montgomery* is distinguishable from this case because the plaintiff there also sought compensation or damages, while Montana Landowners only seek injunctive relief. *Montgomery*, 226 F.3d at 767, 769-770.

[8] In *Sandy Creek*, the Fifth Circuit held that "[a]lthough substantive due process claims alleging deprivations of property are not necessarily subsumed under the Takings Clause," Sandy Creek's

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Because Montana Landowners' Due Process Clause claims are not barred by the failure to exhaust state remedies, resolution by this Court of the undisputed split in the Circuits regarding the protection afforded property by the Due Process Clause would affect Montana Landowners' claims. This Court should grant the Petition.

### B. Other Circuits Would Allow Montana Landowners To Assert A Due Process Clause Claim On The Facts Of This Case.

The State and Intervenors attempted to distinguish this case from those cases of other Circuits that recognize Due Process Clause claims in the property context. State's Response, at 10-13; Intervenors' Response, at 12-17. For example, Intervenors attempted to distinguish *Del-Rio Drilling*, in which the Federal Circuit specifically recognized multiple protections, including the protection afforded by the Due Process Clause, against governmental interference with private property, merely because the Federal Circuit did not use the term "substantive due process." Intervenors' Response, at 16. Furthermore, Intervenors mischaracterize *Villas of Lake Jackson, Ltd. v. Leon County*, 121 F.3d 610 (11th Cir. 1997), arguing that the Eleventh Circuit held there is "no separate cause of action under the Due Process Clause." Intervenors' Response, at 17. In fact, the Eleventh Circuit specifically recognized both a Due Process Clause claim, based on "arbitrary and capricious conduct," and a Takings Clause claim, for want of "just compensation." *Lake Jackson*, 121

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complaint was framed only as a takings claim. *Sandy Creek*, 2003 WL 1469455.

F.3d at 612. What the Eleventh Circuit rejected was a third, hybrid "substantive due process takings" cause of action. *Id.*[9]

The State's and Intervenors' attempts to distinguish the other cases upon which Montana Landowners rely also fail because Due Process Clause claims in the context of governmental interference with private property remain viable in the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Eleventh, District of Columbia, and Federal Circuits. *South County Sand & Gravel Co., Inc. v. Town of South Kingstown*, 160 F.3d 834, 836 (1st Cir. 1998); *Sameric Corp. v. City of Philadelphia*, 142 F.3d 582, 590 (3rd Cir. 1998); *Esposito v. South Carolina Coastal Council*, 939 F.2d 165, 170-171 (4th Cir. 1991); *John Corp. v. City of Houston*, 214 F.3d 573, 583 (5th Cir. 2000); *Montgomery*, 226 F.3d at 768-769; *Daniels v. Area Plan. Comm'n of Allen County*, 306 F.3d 445, 458 n. 14 (7th Cir. 2002); *Iowa Coal Min. Co. v. Monroe County, Iowa*, 257 F.3d 846, 853 (8th Cir. 2001); *Tri County Indus., Inc. v. District of Columbia*, 104 F.3d 455, 459 (D.C. Cir. 1997) ("the requirements of the takings clause cannot be said to exhaust the Fifth Amendment's substantive protection of property rights from government imposition"); *Del-Rio Drilling*, 146 F.3d at 1363; *Lake Jackson*, 121 F.3d at 612. Furthermore, the First, Third, Fourth, Eighth, Eleventh, and District of Columbia Circuits have addressed a Due Process Clause claim on the merits in the land use context. *Smithfield*, 907 F.2d at 243-246; *Sameric Corp.*, 142 F.3d

[9] The State failed to address *Del-Rio Drilling* and *Lake Jackson*, two cases upon which Montana Landowners rely in establishing the conflict among the Circuits on this issue.

at 590-596; *Esposito*, 939 F.2d at 170-171; *Iowa Coal*, 257 F.3d at 853; *Lake Jackson*, 121 F.3d at 614. Clearly, Montana Landowners' claim that their property is afforded protection by the Due Process Clause would not be barred in these Circuits as it is in the Ninth Circuit.

Because Montana Landowners' Due Process Clause claim is barred in the Ninth Circuit, but would not be barred in ten other Circuits, resolution of this split in the Circuits would "alter the outcome of [Montana Landowners'] claim[s]." See, State's Response, at 14. Therefore, this case is a proper vehicle for this Court to resolve this split in the Circuits on this important issue.

This Court should grant the Petition.

## CONCLUSION

For all of the above reasons, this Court should grant this Petition.

Respectfully submitted,

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